Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. SMITH,
Petitioner,

v.

DANIEL R. WADE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an award of punitive damages in an action under 42 U.S.C. § 1983 require a showing of actual malice on the part of the defendant?

2. If a showing of actual malice on the part of the defendant is not required for an award of punitive damages, does it require a showing of some circumstances or conduct in excess of that needed to establish a defendant's liability for compensatory damages under 42 U.S.C. § 1983?

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OPINIONS BELOW

There is no written opinion of the district court. The opinion of the United States Court of Appeals for the Eighth Circuit is as yet unreported, but is reprinted herein as Appendix A.

JURISDICTION

Petitioner seeks review of a judgment issued by the United States Court of Appeals for the Eighth Circuit which affirmed a judgment against him entered in the United States District Court for the Western District of Missouri in an action pursuant to 42 U.S.C. § 1983. The opinion of the Court of Appeals was filed on November 9, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The respondent arrived at the Algoa Reformatory, an institution operated by the Missouri Division of Corrections, in 1976. The Algoa Reformatory is an institution for first offenders, from the ages of 17 to 25 years of age. The institution consists of housing dormitories which have separate rooms, to which inmates have their own keys. In October, 1976, the population of the Algoa Reformatory was approximately 600 inmates. The original designed capacity for the Algoa Reformatory was 425. Dormitory No. 6 contains the punitive and administrative segregation units of the institution. Contrary to the other dormitories in the institution, these units have cells for lock-up purposes. The punitive segregation area is used for short-term confinement and the administrative segregation is used for longer-termed confinement. Dormitory No. 6 has two floors containing 26 cells each.

The respondent had voluntarily checked into the protective custody unit of the Algoa Reformatory in late spring or early summer of 1976. However, following disciplinary violations occurring in the protective custody unit, and after the normal disciplinary process, the respondent was as-

signed to a short-term in punitive segregation and a reassignment to administrative segregation. After serving his term in the punitive segregation unit, the respondent was transferred to the administrative segregation area of the building on the morning of October 27, 1976. At that time the respondent was placed in a cell with another inmate by the name of McCarthy. At approximately ten o'clock that evening, while the petitioner was on duty in the segregation building, another inmate by the name of Thompson was placed in the same cell. The respondent testified that shortly after this McCarthy and Thompson began to harass him and eventually sexually assaulted him.

The population of the segregation units at the time was approximately 110 to 120 (the precise population figure was unavailable because the records are normally maintained for only a period of one year and had been destroyed prior to the filing of this case). At that time, only one guard was assigned to cover both floors of Dormitory No. 6 during the evening shift.

Respondent's complaint pursuant to 42 U.S.C. § 1983 was filed on February 14, 1978. The defendants included Edward Haynes, the then Director of the Missouri Division of Corrections, David Blackwell, the then Superintendent of the Algoa Reformatory, and William Schroeder, Fred Miles, and William Smith, the petitioner herein, correctional officers employed at the Algoa Reformatory Following a jury trial, a verdict was returned in favor of respondent and against the petitioner in the amount of $25,000 actual damages and $5,000 punitive damages. The judgment of the district court was affirmed and opinion filed by the United States Court of Appeals for the Eighth Circuit on November 9, 1981.

REASONS FOR GRANTING THE WRIT

The Court of Appeals below applied an improper standard in affirming the jury's award of punitive damages, in that, (1) the court approved the imposition of punitive damages in the absence of any evidence of actual malice by petitioner against the respondent and, (2) the court held that "malice" in the form of reckless and callous disregard of a prisoner's safety authorizes the imposition of punitive damages in an action under 42 U.S.C. § 1983.

The issue presented herein is what factual basis authorizes an award of punitive damages in an action pursuant to 42 U.S.C. § 1983. The District Court below submitted Instruction No. 7 on punitive damages which is reprinted in its entirety as Appendix B. In short, this instruction authorized the jury to award punitive damages if they found the petitioner's conduct to be "a reckless or callous disregard of, or indifference to, the rights or safety of others . . ." The jury awarded $5,000 in punitive damages in addition to its award of $25,000 in actual damages.

In *Carey* v. *Piphus*, 435 U.S. 247 (1978), this court held that there was no basis for an award of punitive damages in the absence of a finding of actual malice on the part of a defendant. In note 11 at page 257 of that opinion this court stated:

> "This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights. [Citations omitted] Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. The District Court specifically found that petitioners did not act with malicious intention to deprive respondents of their rights or to do them other injury, . . ."

More recently, in *City of Newport* v. *Facts Concert, Inc.*, 49 U.S.L.W. 4860 (U.S. June 26, 1981), this court again stated that under appropriate circumstances punitive damages may be awarded in order to punish for violations of constitutional rights. As to what constitutes appropriate circumstances, this court stated:

> "If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. . . ." *Id.* at 4865.

The majority and dissenting opinions below split over consideration of this court's opinion in *Carey* v. *Piphus*. The majority recognized this court's requirement of proof of "malicious intent" but went on to hold that malicious conduct would include culpable recklessness or a willful and wanton disregard of another's rights. The dissenting opinion not only felt that the *Carey* opinion was controlling but that the majority's result was inconsistent therewith. The dissent pointed out that this court's statement in *Carey* that punitive damages would not be appropriate because the district court had specifically found that the defendants did not act with malicious intention to cause a deprivation of constitutional rights or other injury, was made in the context of another finding by the district court that the defendants should have known that their actions would have violated the plaintiff's constitutional rights. The dissent further pointed out that this was almost identical to the instant case where the jury had been instructed to find the petitioner liable if he knew or should have known of the risk to the respondent. Further, the majority opinion itself fully recognized that there was no evidence of ill will or spite by the petitioner toward the respondent (Appendix A p. 14). The dissent concluded, therefore, that punitive damages were not authorized or appropriate in this case.

In the process of reaching its result, the majority below discussed opinions of other federal courts presenting conflicting standards for the award of punitive damages. On the one hand, they recognized that various courts had required a showing of actual intent or malice in order to award such damages. *Morrow* v. *Igleburger,* 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied,* 439 U.S. 1118 (1979); *Smith* v. *Losee,* 485 F.2d 334, 345 (10th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974); *Pierce* v. *Stinson,* 493 F.Supp. 609, 612 (E.DTn. 1979). For instance, in *Morrow,* the court, citing *Carey,* stated:

> "While punitive damages also may be awarded in appropriate cases to deter the deprivation of constitutional rights, the district court made no specific finding that defendants acted with malicious intent to deprive appellant of his constitutional rights, and no such malice will be presumed. . . ." *Id.* at 769.

In *Smith,* which predated *Carey,* the district court found actual malice on the part of two of the defendants. As to a third defendant, who was held to have acted to punish the plaintiff for supporting a particular political candidate as well as other reasons relating to First Amendment activities, the court of appeals held that this would not support a punitive damage award.

The Courts of Appeals below, however, also noted cases which approved punitive damages based upon a standard of either actual intent or reckless disregard. *Knoczak* v. *Tyrrell,* 603 F.2d 13 (7th Cir. 1979), *cert. denied,* 444 U.S. 1016 (1980); *Cochetti* v. *Desmond,* 572 F.2d 102 (3rd Cir. 1978); *Guzman* v. *Western State Bank of Devils Lake,* 540 F.2d 948 (8th Cir. 1976). It is open to some question as to whether all of these cases stand for this precise proposition. In *Konczak* the court held that punitive damages were not justified because of the absence of evidence of

malicious intent or "aggravating circumstances." Contrary to the suggestion of the 8th Circuit, the only discussion of recklessness in the *Konczak* opinion is in regard to overcoming a claim of good faith. Recklessness is not mentioned in the context of an award of punitive damages.

In *Cochetti*, the court did apply a test of either malicious intent or reckless disregard to justify punitive damages but only as part of a general principle that punitive damages requires a showing of "something more than a bare violation justifying compensatory damages or injunctive relief."

The majority below next pointed to still other cases which implied that punitive damages would automatically be available upon a finding of liability. However, in *Clappier* v. *Flynn*, 605 F.2d 519, 533 (10th Cir. 1979), cited by the Court of Appeals, punitive damages were not even sought in the case. The discussion referred to by the majority below related only to the standard for liability. Further, the 10th Circuit stated in its opinion only that "perhaps" the standard of care on the liability question is "comparable" to that required to support punitive damages. Not only is this statement couched in extremely cautious terms, but the court never delineates precisely what it believes the standard for punitive damages is.

The other case cited by the majority below is *Fielder* v. *Bosshard*, 590 F.2d 105 (5th Cir. 1979), in which the court held that "in order to find cruel and unusual punishment the jury must have found egregious conduct capable of supporting an award of punitive damages." The court, however, went on to note that maliciousness in their opinion includes actions which are substantially certain to result in the consequences of which the plaintiff complains. This latter standard derives from the 5th Circuit's earlier opinion in *Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978),

in which the court had held that either actual intent or conduct which is so likely to produce injury that it can be characterized as substantially certain to result, is necessary to overcome official immunity. Thus, even though the 5th Circuit may in some instances apply the same standard to both liability and punitive damages, the test adopted by the majority below is not nearly as stringent as that applied by the 5th Circuit.

Petitioner had urged the court below to adopt the *Bogard* standard as the test for liability in this case but was rejected. The petitioner had argued below that the evidence in this case did not meet the *Bogard* standard for liability; actual intent or conduct substantially certain to result in injury. The evidence indicated that there were several instances of triple celling in the segregation unit at that time and that this was not unique to the respondent. The statement of the majority below that petitioner knew or should have known hat inmate Thompson was ordered separated from other inmates for his and their safety was, as the majority recognized, based on the detention order for Thompson to administrative segregation which "recommended that he be separated from the *general population* for his own safety and that of others." *See* Appendix A, Page 3 (emphasis added). A detention order is simply a form used by guards, on which various categories justifying detention can be checked. If the records had been available, a great many of the inmates in administrative segregation at that time would probably have had similar statements checked on their detention orders. (It was impossible to determine either the total number of identity of each inmate in administrative segregation at that time because the log books for that unit are maintained for only a one-year period and had been destroyed prior to the filing of this lawsuit). Since the court below rejected the *Bogard's* standard of liability, neither *Bogard* nor *Fielder* would

provide any support for the upholding of an award of punitive damages in this case.

The *Fielder* and *Clappier* cases, even though not specifically approved by the court below, do raise a slightly different aspect of the problem of punitive damages. To the extent that either of these cases can be taken as standing for the proposition that a finding of liability automatically provides a basis for a jury to award punitive damages, petitioner believes they are clearly incorrect. As stated by *Cochetti* v. *Desmond, supra,* punitive damages are reserved for situations in which the conduct of the defendant amounts to more than that necessary to establish a right to compensatory damages. The *Cochetti* opinion, in turn, drew upon Justice Brennan's separate opinion in *Adickes* v. *Kress and Company,* 398 U.S. 144 (1970). In *Konczak* v. *Terrell, supra,* the court approved punitive damages based upon aggravating circumstances. The very use of the term "aggravating" implies some showing of facts beyond the threshold level. Thus, even if a showing of actual malice is not required for the imposition of punitive damages in all instances, petitioner believes it is in this case. The verdict directing instruction in this case submitted to the jury that they should find for the respondent if the petitioner's conduct constituted a "callous indifference or thoughtless disregard of the consequences of one's acts or failure to act." *See* Appendix C. Thus, in this case, the liability and punitive damage submissions to the jury were in virtually identical terms. Thus, while the court of appeals below did not specifically adopt the holdings of either *Clappier* or *Fielder,* by allowing the punitive damage award to stand in this case, it in effect equated a finding of liability with an authorization to the jury to award punitive damages. Petitioner believes this clearly runs contrary to the opinions of the 3rd and 7th Circuits in *Cochetti* and *Konczak.*

In fact, this court faced a similar situation in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974). In that case this court dealt with a defamation claim. Both the liability standard and the standard for punitive damages were loosely worded in terms of recklessness. The district court had found the defendants liable and yet had denied punitive damages. This court affirmed and recognized the distinction between the two even though phrased in very similar terms. First, the plaintiff was required to show that the defendants had acted with a reckless disregard of the truth or falsity of their statements in order to overcome the defense of qualified privilege. This court stated that this was quite different from the common law standard of malice required to support an award of punitive damages in such cases. Petitioner believes that a similar distinction should have been made in this case between facts establishing liability and those justifying punitive damages.

Petitioner believes that the holding of the court of appeals below is directly in conflict both with prior opinions of this court as well as with other opinions of other courts of appeals. At the very least, however, it is obvious that the standards being applied by the various courts of appeals with regard to the imposition of punitive damages are in a great deal of conflict and confusion. The issue of the award of punitive damages in actions brought pursuant to 42 U.S.C. § 1983 is both frequent and substantial. Petitioner submits that this court should, therefore, consider this issue and definitely hold that punitive damages under 42 U.S.C. § 1983 are authorized only upon a showing of actual malice.

CONCLUSION

WHEREFORE, petitioner requests that this court issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and review the question of the standard for imposition of punitive damages pursuant to 42 U.S.C. § 1983.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 80-2120 and 80-2131

No. 80-2120.
Daniel R. Wade,
Appellee,

v.

Edward E. Haynes, Director of Division of Corrections for Missouri; Walter David Blackwell, Superintendent of Missouri Intermediate Reformatory,

William H. Smith, Correction Officer,
Appellant,

William Schroeder, Officer, M.S.P., Fred Miles, Officer, M.S.P.

Appeal from the United States District Court for the Western District of Missouri.

No. 80-2131.
Daniel R. Wade,
Appellant,

v.

Edward E. Haynes, Director of Division of Corrections for Missouri, Walter David Blackwell, Superintendent of Missouri Intermediate Reformatory,
Appellees,

William H. Smith, Corrections Officer, William Schroeder, Officer, M.S.P. and Fred Miles, Officer, M.S.P.,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 17, 1981

Filed: November 9, 1981

Before LAY, Chief Judge, GIBSON, Senior Circuit Judge, and BRIGHT, Circuit Judge.

LAY, Chief Judge.

Daniel R. Wade, an inmate at the Algoa, Missouri reformatory brought suit under 42 U.S.C. § 1983 against three correctional officers, William H. Smith, William Schroeder, and Fred Miles; Edward E. Haynes, Director of the Missouri Division of Corrections and Walter Blackwell, superintendent at the reformatory. He claimed that on October 27, 1976, he was wrongfully placed in an administrative cell with two other prisoners where he was beaten and sexually assaulted. The district court directed a verdict in favor of Haynes and one of the correctional officers, Miles. Thereafter, the jury entered verdicts for Blackwell and Schroeder, but awarded Wade $25,000 compensatory damages and $5,000 punitive damages in his claim against Smith. Smith has appealed; Wade cross-appeals claiming the trial court erred in failing to grant judgment notwithstanding the verdict in his claim against Blackwell, the superintendent, and one of the correctional officers, Schroeder.

On appeal Smith challenges (1) the overall sufficiency of the evidence; (2) the trial court's instruction on cruel and unusual punishment; (3) the trial court's ruling on cross-examination by plaintiff's counsel and closing argument; (4) the exclusion of documentary evidence; (5) the use of expert testimony; and (6) the award of punitive damages. On cross-appeal Wade asserts that there was uncontroverted evidence warranting a directed verdict against Blackwell and Schroeder.

Smith's Claims.

Smith first challenges the sufficiency of plaintiff's evidence to take the case to the jury. He contends that as a prison official he was immune from liability unless there was evidence that he was guilty of gross negligence or reckless misconduct. *See Procunier* v. *Navarette*, 434 U.S. 555 (1978).

The facts demonstrate sufficient evidence to sustain

the verdict against Smith. At the time of the assault Wade was approximately 18 years old, five feet, eight inches tall and weighed approximately 130 pounds. He had previously spent some time in the reformatory's special treatment unit. The special treatment unit is an area secured from the general reformatory population and is used for housing those inmates susceptible to physical abuse from members of the general population. Wade spent some time in punitive segregation for rule violations which occurred during his stay in the special treatment unit; thereafter he was assigned to a cell in the administrative segregation unit of the prison. Schroeder, a correctional officer, placed Wade in a cell on the second floor of the administrative segregation unit with another prisoner from the general population. Later that evening Smith replaced Schroeder and subsequently put a third inmate from the general population in the cell with Wade and the other inmate. The third inmate had been sent to administrative segregation for fighting and it was recommended that he be separated from the general population for his own safety and that of others. Shortly after the third inmate was placed in the cell, Wade charges that both inmates began to harrass him and eventually beat and sexually assaulted him. Wade alleges that defendants knew or should have known that he was likely to be assaulted under these circumstances, particularly in light of American Correctional Association standards which recommended single unit housing in administrative segregation units, and the availability of at least one other cell containing only one prisoner.

Smith's conduct was such that a jury could reasonably find that he either knew or should have known that the third prisoner, Thompson, had been ordered separated from the other inmates for his own safety and the safety of others. Smith made no effort to check whether another cell was available. Smith knew another prisoner had been beaten

to death in his cell during that shift only a few weeks before. Dormitory six was a two-story dormitory with 26 cells on each floor. The cells on the second floor were approximately 65 square feet in size. The only access to the cells on the second floor was through steel doors, locked from the outside, with several small holes at the top of the doors. It was impossible for guards to see an entire cell without opening the door. A reformatory guard testified at trial that experience and common sense dictated that in dormitory six general population inmates and those inmates who had been housed in the special treatment unit be segregated.

The Official Immunity Defense.

> It has been said of the immunity defense that:
>
> It does not insulate an official who, although not possessed of any actual malice or intent to harm, is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inaction.

Bogard v. *Cook,* 586 F.2d 399, 412 (5th Cir. 1978).

We agree with the Seventh Circuit:

> In order to state an eighth amendment claim resulting from an attack . . . a prisoner must show that prison officials "deliberately deprived" him of his constitutional rights. Deliberate deprivation may result from actual intent to deprive him of his rights or from recklessness in ignoring known threats.

Schaal v. *Rowe,* 460 F. Supp. 155, 157 (E.D. Ill. 1978). *See Little* v. *Walker,* 552 F.2d 193, 197 n.8 (7th Cir. 1977). We conclude there existed sufficient evidence to demonstrate that Smith recklessly and with callous indifference placed Wade into a dangerous situation.

On appeal Smith also challenges the court's instruction relating to the eighth amendment. The court's instruction reads in part:

> As stated before, the Eighth Amendment to the Federal Constitution provides that no cruel and unusual punishment may be inflicted. In order for an alleged physical injury to constitute cruel and unusual punishment, the injury must constitute physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities.

The court also instructed the jury that they must find the defendant's conduct was either grossly negligent or was an egregious failure to protect the plaintiff and violated his right to be free from cruel and unusual punishment.[1]

The challenge made here is that the instructions misled the jury in focusing on the injury itself. Smith argues that the concern should be not whether the injury inflicted was an unnecessary and wanton infliction of punishment but whether there was an egregious failure to protect plaintiff. Thus it is urged that the nature of the injury is relevant only to the question of damages and not to whether there was in fact a constitutional violation by the infliction of a cruel and unusual punishment. Smith thus maintains that this instruction is also inconsistent with the other instructions relating to gross negligence and egregious failure to act. He also now complains that the court erred in defining gross negligence as equivalent to "callous indifference." Smith, relying on *Bogard* v. *Cook, supra,* 586 F.2d 399 urges that these terms fail to demonstrate intent as opposed to simple negligence. In sum, the defendants argue that these combined instructions relate to the nature of the injury which determines the cruel and unusual punishment rather than the conduct of the defendants.

---

[1]The court defined gross negligence as "a callous indifference or thoughtless disregard for the consequences of one's act or failure to act" and an egregious failure to protect as "a flagrant or remarkably bad failure to protect."

We must disagree.[2] The instructions must be viewed in their entirety. Instruction number 5, the verdict director, read:

> Your verdict must be for the plaintiff if you believe:
>
> FIRST: Defendants knew or should have known that placing two or more inmates in the same cell in administrative segregation with only one guard on duty in that building made it highly foreseeable that some inmates, and in particular the plaintiff Daniel R. Wade, would be physically attacked and sexually abused, and
>
> SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff Daniel R. Wade, and
>
> THIRD: Such acts of the defendants were done under the color of the law of the State of Missouri, and,
>
> FOURTH: Such acts violated plaintiff's constitutional right to be free from cruel and unusual punishment, and,
>
> FIFTH: As a direct result of such conduct, the plaintiff suffered injury.
>
> Gross negligence as used in this instruction means a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act.
>
> Egregious failure to protect means a flagrant or remarkably bad failure to protect.

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[2]The objection concerning the use of "callous indifference" is specious. *See Clappier* v. *Flynn*, 605 F.2d 519, 531 (10th Cir. 1979); *Fielder* v. *Bosshard*, 590 F.2d 105 (5th Cir. 1979). *See also Estelle* v. *Gamble*, 429 U.S. 97 (1976). In the instruction conference with the court defendant's counsel stated:

> I think when we are talking about a civil rights case, we are talking about callous, assuming gross negligence is a standard, to callous indifference to their constitutional rights and not simply as phrased here, to the consequences of one's act or failure to act.

These instructions make it clear that for plaintiff to recover defendants' *acts* must have violated plaintiff's right *to be free* from cruel and unusual punishment. Thus, defendant's action must have been more than negligent, his conduct must have been such that it was done with callous disregard of plaintiff's right not to be punished in an inhumane and base way. The mere placement of plaintiff in the cell with two others from the general population without further incident would not have given legal sustenance to his claim under the eighth amendment. It was the callous nature of this act which recklessly exposed him to inhumane treatment which constituted the actionable wrong. The inhumane treatment was part of the wrong in the same sense as if Smith had committed the harm himself.

We find no prejudicial error in the instructions.

Smith next urges that the court erred in permitting certain questions by plaintiff's counsel on cross-examination as well as comments concerning this subject matter during closing argument.

Smith's objections include: (1) Wade's counsel's cross-examination of him relating to an alleged unwritten policy followed by prison officials regarding the segregated celling of black and white inmates while in administrative segregation; (2) the question "But you can mix homosexuals with people who aren't homosexuals?" and (3) a question relating to the earlier murder of a black inmate by his black cellmate, which occurred a few weeks prior to the assault on Wade.

Smith argues that these questions and the subsequent testimony were unfairly prejudicial under Fed. R. Evid. 403 and should not have been admitted.

A trial judge can and should exclude evidence when convinced that it will create a danger of prejudice out-

weighing its probative value. *E. I. DuPont DeNemours* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1272 (8th Cir. 1980). However, rule 403 of the Federal Rules of Evidence does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest decision on an improper basis. *Carter* v. *Hewitt*, 617 F.2d 961, 972 (3rd Cir. 1980).

Considering that this case involved a homosexual rape and in light of Wade's various assertions, including the allegation that another, safer, cell was available and that he was not celled there because of an unwritten policy of segregating inmates, the questions relating to those matters do not appear unfairly prejudicial.

Smith also alleges that the trial court erred in excluding from evidence a letter allegedly written by Wade which he sought to introduce for impeachment purposes. Smith contends that the letter was admissible under Fed. R. Evid. 613(b) as extrinsic evidence of a prior inconsistent statement. The trial court excluded the letter, which was dated July 25, 1978, on the ground that it was written long after the incident in question and was irrelevant. It is our rule that the trial court's ruling on the admissibility of evidence will not be disturbed absent a clear and prejudicial abuse of discretion. *E. I. DuPont DeNemours* v. *Berkley & Co., Inc., supra*, 620 F.2d at 1272. The letter in question appears to have been written by Wade and was directed to the prison classification board. In it Wade makes various statements regarding his future conduct which imply that his conduct prior to that date had been less than desirable. However, there appears to be nothing in the letter or in the transcript which demonstrates a clear abuse of discretion by the trial court in excluding the letter.

Smith also claims the district court erred in permitting testimony by an expert witness, David Musacchio, who was

called by Wade as an expert in corrections administration. The testimony was as follows:

> Q. You mentioned before that you could compare this with overcrowding of a hospital. Well, you might have some putting people in the same rooms in the hospital. Could you draw that analogy out even further? If you have to double cell, if you have to double cell in an institution, do you look at the background of the inmates before you put them in that cell?
>
> A. I would think a prudent administrator would, yes.
>
> Q. And if he, in fact, does not look at the background, is it—is that egregious failure?
>
> . . . .
>
> A. Yes.

Smith asserts this question improperly calls for a legal conclusion and, since the witness was not qualified as a legal expert, testimony on that issue was improper. It is settled, however, that testimony otherwise admissible is not inadmissible because it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704.

In *Neilson* v. *Armstrong Rubber Co.*, 570 F.2d 272 (8th Cir. 1978) this court held it was not error for an expert witness to offer testimony regarding the cause of a defect in a tire. In that case the court acknowledged the wide discretion of the trial court in determining the admissibility of expert testimony. *Id.* at 276. It also stated "[t]he extent of a witness' knowledge of matters about which he offers to testify go to the weight rather than the admissibilty of testimony." *Id.* at 277. Cognizant of *Neilson*, Smith would distinguish this case on the ground that a legal conclusion was involved here, rather than a factual issue. He relies upon *Stoler* v. *Penn. Central Transp. Co.*, 583 F.2d 896 (6th Cir. 1978) which upheld the trial court's

exclusion of testimony by a civil engineer whether a particular railroad crossing was "extra hazardous." Although the Sixth Circuit did characterize the question as calling for a legal opinion, it appears to have based its decision on the broad discretion accorded the trial judge in such circumstances.[3]

We agree that the issue is a close one.[4] In the sense that the question attempted to have the witness testify that defendant's conduct violated a constitutional norm, the form of the question was improper in seeking a pure legal conclusion. *See* Fed. R. Evid. 701. On the other hand the jury had the right to be informed concerning prison policy and to consider evidence as to whether the failure to review the background of prisoners in making cell assignments amounted to a breach affecting their personal safety. In view of the overall testimony we do not find the trial court's ruling an abuse of discretion or "manifestly erroneous." *Soo Line R. Co.* v. *Fruehauf Corp.*, 547 F.2d 1365, 1374 (8th Cir. 1977).

Smith urges that the trial court erred in permitting improper remarks by plaintiff's counsel during closing argument. He asserts that the "tenor" of the argument exceeded all permissible bounds. The statements to which he specifically refers are: (1) a reference to defendants leaving a "legacy of blood, tears, rape and murder;" and (2) the following statement by Wade's counsel:

---

[3]Smith also relies on *Marx & Co. Inc.* v. *Diners Club, Inc.*, 550 F.2d 505 (2d Cir. 1977), *cert. denied*, 434 U.S. 861 in which the Second Circuit held that it was error not to exclude the testimony of a securities expert who was also a lawyer regarding his opinion of the legal obligations under a contract. The court in that case appeared to base its decision on the fact that the witness not only construed the contract at issue but repeatedly gave his conclusions as to the legal significance of various facts adduced at trial.

[4]We also note, as stated by Smith's counsel, the question related to the administrator's responsibility and not Smith's.

> I'm asking you send a message to Danny Wade, as a 17 year old boy in prison, 18 when he was raped, his Dad came here and testified about it, about what he was like. Some of you may be fathers and I'm a father. With a little bad luck, my boy might sometime have to go to an institution like that for robbery or theft. . . . for burglary, and he won't deserve to be raped for that."

Although we do not condone such argument, particularly counsel's hypothetical personal references, we do not find the comment so inflammatory or flagrant as to unduly and materially affect the verdict of the jury. *See Wichmann* v. *United Disposal, Inc.*, 553 F.2d 1104, 1107 (8th Cir. 1977).

Damages.

Also under attack on appeal is the award of $5,000 in punitive damages. Smith challenges the instruction given the jury which read:

> In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you may assess punitive or exemplary damages in addition to any award of actual damages.

He argues that the court's instructions on the issues of liability and punitive damages are essentially the same and insists that, to be in keeping with the purpose of punitive damages, a more stringent standard is required.

Generally, punitive damages are available in section 1983 actions where there are aggravated circumstances. *Konczak* v. *Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980); *Spence* v. *Staras*, 507 F.2d 554, (7th Cir. 1974). In construing punitive damages some courts have held that only a showing of malice or actual intent will support an award of punitive damages. *Morrow* v. *Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Smith* v. *Losee*, 485 F.2d 334, 345 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Pierce* v. *Stinson*, 493 F. Supp. 609, 612 (D. Tenn. 1979). Still others have required intent or reckless disregard. *Konczak, supra*, 603 F.2d at 17; *Cochetti* v. *Desmond*, 572 F.2d 102, 105 (3rd Cir. 1978). In *Guzman* v. *Western State Bank* this court held that punitive damages may "be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct or a reckless disregard for the rights of the plaintiff." 540 F.2d at 953. In a separate opinion in *Adickes* v. *S. H. Kress*, 398 U.S. 144 (1970) Justice Brennan stated "[t]o recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983." Id. at 233. (Brennan, J.; concurring in part and dissenting in part). However, in that opinion he goes on to state that a showing of knowledge or reckless disregard for the constitutional rights of a plaintiff would support such an award. *Id.*

Viewed in light of the more stringent test for determining liability in section 1983 actions involving failures to act or ommissions by prison officials the question becomes whether punitive damages are a necessary concomitant of a finding of liability. At least one court has suggested that it is. *Clappier* v. *Flynn*, 605 F.2d 519, 533 (10th Cir. 1979). But the impact of that language is undermined by the fact that the plaintiff in that case sought only compensatory damages. The Fifth Circuit has taken

the strongest position yet articulated in upholding an award of punitive damages against a county sheriff, concluding that "[i]n order to find cruel and unusual punishment, the jury must have found egregious conduct capable of supporting an award of punitive damages." *Fielder* v. *Bosshard*, 590 F.2d 105, 111 (5th Cir. 1979).

In *Harris* v. *Harvey*, 605 F.2d 330, 340 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980) the court upheld an award of punitive damages against a municipal judge for conduct amounting to a "racially motivated campaign" to discredit the plaintiff, a police official. That court found the punitive damages justified in view of the jury's finding that the judge had acted "maliciously, wantonly or oppressively." *Id.*

While these cases suggest that a finding of liability automatically triggers the consideration of punitive damages that question is appropriately left to the broad discretion of the jury. *City of Newport* v. *Fact Concerns*, 49 U.S.L.W. 4860, 4865 (U.S. Dec. June 26, 1981); *Guzman* v. *Western State Banks*, 540 F.2d 953 (8th Cir. 1976). As the Third Circuit recently stated: "the allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact." *Scott* v. *Plante*, 641 F.2d 117, 135 (3rd Cir. 1981). But that opinion also implies that there must be some minimal showing beyond that required for liability to justify such an award: "[w]hen the evidence is simply too sparse to determine the punitive damages issue one way or another, and plaintiff bears the burden of proving malice or wantonness, perhaps a jury award of punitive damages cannot stand." *Id.*

The Supreme Court in *Carey* v. *Piphus*, 435 U.S. 247

(1978), although not expressly approving or disapproving punitive damages in section 1983 cases, did indicate, however, if such were approved the predicate for recovery would require proof of "malicious intent." Malicious conduct has long been defined so as to include "culpable recklessness or a willful and wanton disregard" of another's rights. *See e.g., Galloway* v. *General Motors Acceptance Corp.*, 106 F.2d 466 (4th Cir. 1939). As we have earlier indicated in this opinion liability in civil rights cases may be incurred even though an official does not possess "any actual malice or intent to harm [but] is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inactions." *See Bogard* v. *Cook, supra.* This is so because deliberate intent may be predicated on factual circumstances which are so egregious and reckless that the natural consequences of the actor's conduct implies the requisite malicious intent to do wrong. *See Estelle* v. *Gamble*, 429 U.S. 97, 105-06 (1976). Although the record here shows no evidence of ill will or spite by Smith against Wade, it does demonstrate a reckless and total disregard for the safety of prisoners in his care. Thus we conclude a finding of malice may be found from an official's reckless and callous disregard of known dangers. In the present case Smith knew or should have known that Thompson had been ordered separated from the other inmates for his safety and that of others. The record also indicates that Smith made little or no effort to determine whether another cell was available or that he ever checked on the inmates during his shift. This, coupled with the knowledge that Elijah Smith was beaten to death in his cell during Smith's shift only a few weeks before, could conceivably persuade the jury of a need for some deterrent to avoid further conduct of this type. The Supreme Court has recently suggested that deterrence is an even more important purpose of section 1983 than retribution. *City of Newport* v. *Fact Concerts, supra,* 49 U.S.L.W. at 4865.

Upon review the amount of punitive damages may be disturbed only when it appears, in the judgment of the reviewing court to be unfair and shocking. *Guzman* v. *Western State Bank, supra,* 540 F.2d at 954. We find the award of punitive damages justifiable under the evidence.

Wade's Cross-Appeal.

Wade initiated this cross-appeal charging that the district court erred in refusing to grant directed verdicts against defendants Blackwell and Schroeder. He maintains that there was uncontroverted evidence that both Blackwell and Schroeder committed an egregious failure to protect him from assault. A review of the record reveals that this contention is without merit. Defendant Blackwell testified only in regard to administrative practices and policies. Schroeder testified that he moved Wade from punitive segregation to administrative segregation on October 27, 1976, and placed Wade in the cell with one other inmate. It was for the jury to decide whether the overall evidence warranted a verdict in favor of the plaintiff as to these defendants. The evidence was conflicting and the court properly submitted the cases to the jury. There is nothing in the testimony of either defendant or in the record itself which would require reasonable men to reach only one verdict. *Hladyshewski* v. *Robinson,* 557 F.2d 1251, 1252, (8th Cir. 1977.)

The judgment of the district court is affirmed. Plaintiff Wade shall pay the costs on the cross-appeal.

GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's opinion holding that a qualified immunity will not shield a prison official from liability for injuries caused from a "callous indifference to a prisoner's rights." I dissent from that part of the opinion allowing punitive damages without a finding of actual malice.

The decision of the majority on the latter point is directly contrary to a part of the holding of *Carey* v. *Piphus*, 435 U.S. 247 (1978). Furthermore, even if gross negligence or recklessness could substitute for malice in an award of punitive damages, the jury was improperly instructed. Finally, the evidence in this case would not support a finding of either actual malice or gross negligence or recklessness.

The Supreme Court has never expressly held that punitive damages are available in § 1983 actions. Nevertheless, lower courts have often allowed the recovery of punitive damages. *See* cases cited p. 12 *ante*. Even without deciding this issue, the Supreme Court has included in its holdings a standard for the award of punitive damages under § 1983. In *Carey*, the Court held that malice on the part of a defendant is a prerequisite to an award of punitive damages.

The Court in *Carey* avoided the question of whether punitive damages are proper by holding that if they were, they would be proper only when malice is present. The Court stated:

> Although we imply no approval or disapproval of any of these cases [allowing punitive damages for § 1983 violations,] we note that there is no basis for such an award in this case. The District Court specifically found that *petitioners did not act with a malicious intention* to deprive respondents of their rights or to do them other injury. . . .

435 U.S. at 257 n.11 (emphasis added).

Instead, the district court in *Carey* found that defendants "should have known that [their conduct] would violate procedural due process." 435 U.S. at 251. The Supreme Court allowed an award of compensatory damages, despite

the qualified immunity of defendants, because they should have known that they were violating plaintiffs' rights. The additional element of malice was necessary before punitive damages could be awarded; the Court withheld judgment on whether punitive damages are permissible even when malice is present.

There is a distinction between the type of wrongdoing necessary to cast away the shield of qualified immunity and to justify an award of punitive damages. This distinction is overlooked by the majority. Pp. 12-13 *ante*. When the findings in *Carey* are laid side by side with those in the case before us, *Carey* clearly controls its disposition. In *Carey*, two students in Chicago public schools received twenty-day suspensions for rules violations. Neither received a hearing in connection with the suspensions. The district court held that the suspensions violated the procedural due process rights of the students, and defendants did not challenge that holding. In the instant case, the district court found that Smith violated Wade's right to be free from cruel and unusual punishment. The *Carey* district court found that defendants " 'should have known that a lengthy suspension without any adjudicative hearing of any type' would violate procedural due process." 435 U.S. at 251. In the instant case, the jury was instructed to find for the plaintiff if:

> Defendants knew or should have known that placing two or more inmates in the same cell in administrative segregation with only one guard on duty in that building made it highly foreseeable that [Wade] would be physically attacked and sexually abused, and
>
> . . . .
>
> . . . Such acts violated plaintiff's constitutional right to be free from cruel and unusual punishment.

Pp. 6-7 *ante*.

The Supreme Court in *Carey* did not disturb the district court's finding that defendants were not entitled to qualified immunity because they should have known that their conduct would deprive plaintiffs of constitutional rights. The district court relied on *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). In the instant case, the majority finds that Smith is not entitled to qualified immunity because of his callous indifference to Wade's rights. Pp. 4-5 *ante*. I agree with that decision.

In *Carey* the district court held that defendants "did not act 'with the malicious intention to cause a deprivation of constitutional rights or other injury. . . .'" 435 U.S. at 251 n.6, *quoting Wood* v. *Strickland*, 420 U.S. at 322. This court finds "no evidence of ill will or spite by Smith." Pp. 14 *ante*. The Supreme Court in *Carey* held "there is no basis for such an award [of punitive damages] in this case. The District Court specifically found that petitioners did not act with a malicious intention." 435 U.S. at 257 n.11. The majority would award punitive damages even without a showing of actual malice.

The cases cited by the majority for the proposition that reckless disregard of a plaintiff's constitutional rights can be a basis for an award of punitive damages are inappropriate. *Cochetti* v. *Desmond*, 572 F.2d 102 (3d Cir. 1978), and *Guzman* v. *Western State Bank of Devils Lake*, 540 F.2d 948 (8th Cir. 1976), both predated *Carey*. Furthermore, the *Cochetti* court determined that punitive damages were not in order; it did not have to decide if mere recklessness or callousness is sufficient. 572 F.2d at 106.

The other case cited by the majority, *Konczak* v. *Tyrrell*, 603 F.2d 13 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980), also fails to support the majority position. At the page cited by the majority, the court requires "intent or reckless disregard" only to get beyond the quali-

fied immunity defense. 603 F.2d at 17. When the court discussed punitive damages, it cited *Carey* and six lower court cases supporting the malice requirement. 603 F.2d at 18.

The majority argues that malice includes recklessness or a willful and wanton disregard of another's rights. None of the cases cited by the majority, *see* p. 14 *ante*, support this proposition.[1] Indeed, two of the majority's cases refer to malice as something distinct from recklessness. *See Bogard* v. *Cook*, 586 F.2d 399, 411 (5th Cir. 1978); *Galloway* v. *General Motors Acceptance Corp.*, 106 F.2d 466, 471 (4th Cir. 1939). The Supreme Court citation offered by the majority makes no reference to malice and the case deals only with liability under § 1983, not punitive damages. *Estelle* v. *Gamble*, 429 U.S. 97, 105-06 (1976).

The majority would have been correct in arguing that recklessness or gross negligence, if outrageous, as well as malice will often support a claim for punitive damages. *See, e.g., Restatement (Second) of Torts* § 908(2) (1979). However, we are not dealing with the common law of torts. We are dealing with interpretation of a federal statute. Although under a narrow reading *Carey* may not always require actual malice, the case at least requires application of different standards for liability and an award of punitive damages. Contrary to the instructions to the jury, mere callousness or recklessness should not be sufficient to support an award of punitive damages under § 1983. The majority is not following *Carey's* mandate to require more egregious conduct when punitive damages are sought than is necessary to surmount the qualified immunity doctrine.

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[1] In the special area of defamation, the Court has adopted a definition of actual malice which includes recklessness. *N. Y. Times* v. *Sullivan*, 376 U.S. 254, 280 (1964).

Even if the majority's view of the law is correct, the jury was not instructed in accordance with that view. The majority concluded that malice could be inferred from an official's "reckless and callous disregard" of known dangers. P. 14 *ante*. On the other hand, the jury was told it could award punitive damages if there was a "reckless *or* callous disregard" of the safety of others. P. 12 *ante* (emphasis added). Under the majority's view a remand is in order to determine whether Smith acted recklessly. Of course, a remand would not be necessary if the majority concludes that not only does "malice" include "recklessness" but it includes "callousness" as well, and either suffices for the other.

Finally, the facts of this case do not support a finding of recklessness or gross negligence. Out of fifty-two cells in the dormitory, only one housed a single prisoner. In light of the difficulties of administering a crowded prison, Smith's conduct cannot be characterized as gross negligence or recklessness.

Because of the controlling precedent regarding the award of punitive damages as well as the facts of this case, I dissent from the award of punitive damages. I join the rest of the opinion of the majority.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

INSTRUCTION NUMBER 7

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you may assess punitive or exemplary damages in addition to any award of actual damages.

If punitive or exemplary damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same or they may be different. The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.

APPENDIX C

INSTRUCTION NUMBER 5

Your verdict must be for plaintiff if you believe:

FIRST: Defendants knew or should have known that placing two or more inmates in the same cell in administrative segregation with only one guard on duty in that building made it highly foreseeable that some inmates, and in particular the plaintiff Daniel R. Wade, would be physically attacked and sexually abused, and

SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff Daniel R. Wade, and

THIRD: Such acts of defendants were done under the color of law of the State of Missouri and

FOURTH: Such acts violated plaintiff's Constitutional right to be free from cruel and unusual punishment.

FIFTH: As a direct result of such conduct, the plaintiff suffered injury.

Gross negligence as used in this instruction means a callous indifference or thoughtless disregard for the consequences of one's acts or failure to act.

Egregious failure to protect means a fragrant or remarkably bad failure to protect.

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAY 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. SMITH,
Petitioner,

v.

DANIEL R. WADE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED DECEMBER 23, 1981
CERTIORARI GRANTED APRIL 19, 1982

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*The opinion of the lower court, of which the petitioner seeks review, is contained in the appendix to the petition for writ of certiorari.

No. 81-1196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. SMITH,
Petitioner,

v.

DANIEL R. WADE,
Respondent.

JOINT APPENDIX

RELEVANT DOCKET ENTRIES
United States District Court,
Western District of Missouri

February 14, 1978	Complaint filed.
March 16, 1978	Motion by defendants to Dismiss, with Suggestions in Support Thereof, filed.
March 27, 1978	First Amended Complaint filed.
April 5, 1978	Motion by defendants to Dismiss, with Suggestions in Support Thereof filed.
April 14, 1978	Suggestions by plaintiff in Opposition to Motion to Dismiss filed.

May 30, 1978	Order Granting Plaintiff's Motion for Leave to File Supplemental Suggestions in Opposition to Motion to Dismiss filed.
June 7, 1978	Report and Recommendation of the United States Magistrate that the defendant's Motion to Dismiss be Denied filed.
July 27, 1978	Motion by plaintiff to File Second Amended Complaint with Suggestions in Support Thereof, filed.
August 10, 1978	Order Granting Plaintiff Leave to File Second Amended Complaint filed.
August 10, 1978	Second Amended Complaint filed.
August 21, 1978	Answer by defendants filed.
March 11, 1980	Trial of this case is before the Honorable Scott O. Wright. Parties announce ready for trial. Jury is called, duly sworn, empaneled and comes as follows: 1. James Edwin Paneck; 2. Erick R. Hopper; 3. Orin W. Chappell; 4. Finice O. Porter; 5. John W. Richard; 6. Jessie Riley; alternate Fred Pimberton. Opening statements, plaintiff presents evidence. Court is in recess until 9:00 a.m. March 12, 1980. Defendants' Oral Motion for Continuance before trial began—denied. Minute Sheet—filed. Jury list—filed.
March 12, 1980	Parties again come for trial. Plaintiff continues testimony. Court is in recess until 9:00 a.m. March 13, 1980. Minute sheet—filed.

March 13, 1980	Parties again come for trial. Plaintiff continues to present evidence. Court is in recess until 9:00 a.m., March 14, 1980. Attorneys remain for instruction conference.
March 13, 1980	Parties again come for trial. Plaintiff continues to present evidence. Plaintiff rests. Defendant's Motion for Directed Verdict in Favor of Defendants, Close of Plaintiff's Evidence—overruled. Defendant presents evidence. Defendants rest. Plaintiff moves for a directed verdict (oral)--overruled. Defendant's Motion for Directed Verdict in Favor of Defendants at Close of All the Evidence—filed. Sustained as to defendants Haynes and Miles. Overruled as to defendants Smith, Schroeder and Blackwell. Closing arguments made. Instructions given to the jury. Jury retires to deliberate. Instructions —filed. Exhibits lists—filed. 7:00 p.m. verdict returned. Jury finds in favor of plaintiff against defendant William Henry Smith on the issue of actual damages in the amount of $25,000. And, the jury finds in favor of plaintiff and against defendant William Henry Smith on the issue of punitive damages in the amount of $5,000. Court is adjourned. Verdict forms filed. Minute Sheet—filed.
March 14, 1980	Judgment on jury verdict as to defendant Smith. Filed.

March 24, 1980	Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial filed.
October 21, 1980	Order denying defendant William Smith's Motion for Judgment Notwithstanding the Verdict, or Alternatively for New Trial filed.
November 7, 1980	Notice of Appeal filed by defendant.

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF MISSOURI

FILED AUGUST 10, 1978

DANIEL R. WADE,
Plaintiff,

vs.

EDWARD E. HAYNES,
Director of the Division of
Corrections of the State of Missouri,

WALTER DAVID BLACKWELL,
Superintendent of the Missouri
Intermediate Reformatory,

WILLIAM H. SMITH,
Corrections Officer for Division of
Corrections of the State of Missouri,

WILLIAM SCHROEDER,
Corrections Officer for Division of
Corrections of the State of Missouri,

FRED MILES,
Corrections Officer for Division of
Corrections of the State of Missouri,

and

DIVISION OF CORRECTIONS OF
THE STATE OF MISSOURI.

Case No.
78 4043 CV-C
SECOND
AMENDED
COMPLAINT

Comes now plaintiff and having requested leave to amend pursuant to Rule 15 of the Federal Rules of Civil Procedure files his SECOND AMENDED COMPLAINT.

JURISDICTION AND VENUE

1. Plaintiff files this complaint, institutes these proceedings and invokes the jurisdiction of this Court under and by virtue of 28 USC Section 1343 to obtain the costs of suit, including reasonable attorneys' fees, and damages suffered by Mr. Daniel R. Wade caused by defendants' violation of his rights as guaranteed in the Eighth and Fourteenth Amendments to the Constitution of the United States and by federal law, particularly the Civil Rights Act, 42 USC 1983.

This Court also has jurisdiction of this action under 28 USC Section 1331, in that the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and arises under the Eighth and Fourteenth Amendments of the Constitution of the United States.

2. The violation of plaintiff's rights as alleged herein was committed within the State of Missouri.

PARTIES

3. Plaintiff, Daniel R. Wade, is a citizen of the United States of America and was at all times relevant herein an inmate of the Division of Corrections of the State of Missouri, incarcerated at the Missouri Intermediate Reformatory, known as Algoa, in Cole County, Missouri.

4. Defendant, Edward E. Haynes, was at all times relevant herein the duly appointed, qualified and acting Director of the Division of Corrections of the State of Missouri (organized pursuant to the Omnibus Reorganization Act of 1974, Appendix B, Section 15 (13) and Sections 216.010 RSMo. *et seq.*) and is and at all times relevant herein was a resident of Callaway County, Missouri.

5. Defendant, Walter David Blackwell, was at all

times relevant herein the duly appointed, qualified and acting Superintendent of the Missouri Intermediate Reformatory, known as Algoa, and is and at all times relevant herein was a resident of Cole County, Missouri.

6. Defendant, William H. Smith, was at all times relevant herein a duly appointed, qualified and acting Corrections Officer of the Division of Corrections of the State of Missouri and is and at all times relevant herein was a resident of Maries County, Missouri.

7. Defendant, William Schroeder, was at all times relevant herein a duly appointed, qualified and acting Corrections Officer of the Division of Corrections of the State of Missouri and is and at all times relevant herein was a resident of Cole County, Missouri.

8. Defendant, Fred Miles, was at all times relevant herein a duly appointed, qualified and acting Corrections Officer of the Division of Corrections of the State of Missouri and is and at all times relevant herein was a resident of Cole County, Missouri.

9. Defendant Division of Corrections, is and was at all times relevant herein a division of the government of the State of Missouri organized pursuant to the Omnibus Reorganization Act of 1974, Appendix B, Section 15 (13) and Sections 216.010 RSMo *et seq.*

10. Defendants, Edward E. Haynes, Walter David Blackwell, William H. Smith, William Schroeder and Fred Miles are sued individually and in their official capacities. Relief is sought against each and all defendants as well as their agents, assistants, successor, employees and persons acting in concert or cooperation with them or at their direction or under their supervision.

11. At all times relevant herein the defendants, Edward E. Haynes, Walter David Blackwell, William H.

Smith, William Schroeder and Fred Miles and their agents, assistants, and employees acted pursuant to the policies, regulations or decisions officially adopted or promulgated by those in the Division of Corrections whose acts may fairly be said to represent official policy or were pursuant to governmental custom of the Division of Corrections.

12. At all times relevant herein defendants have acted under the color of authority of the law of the State of Missouri or in active concert with such defendants who are so acting.

COMPLAINT

COUNT ONE

13. On or about January 26, 1976, plaintiff entered the Missouri Intermediate Reformatory (hereinafter referred to as Algoa).

14. Shortly after plaintiff entered Algoa, defendants Edward E. Haynes, Walter David Blackwell and the Division of Corrections and their officers, agents, assistants and employees working under their supervision, placed plaintiff in a special treatment unit for his protection because of his susceptibility to physical attack and sexual abuse from prisoners of the general population.

15. On or about October 27, 1976, defendants, Edward E. Haynes, Walter David Blackwell, William H. Smith, William Schroeder, Fred Miles, the Division of Corrections or officers, agents, assistants or employees working under their supervision locked plaintiff in a cell on the second floor of an administrative segregation building with two prisoners who had been in the general population of Algoa.

16. On or about October 27, 1976, and October 28, 1976, only one guard was on duty in that administrative segregation building.

17. On or about October 27, 1976, and October 28, 1976, plaintiff was viciously, maliciously and brutally, assaulted and battered and forcibly subjected to acts of sodomy and buggery by two inmates who had been in the general population of the prison, causing plaintiff to suffer extreme physical pain and mental anguish and humiliation, the full extent of which cannot be measured.

18. Defendants Edward E. Haynes, Walter David Blackwell, William H. Smith, William Schroeder, Fred Miles and the Division of Corrections and their officers, agents, assistants and employees individually and collectively were grossly negligent in:

(a) allowing two or more inmates housed in the administrative segregation building to be placed in the same cell while only one guard was on duty in that building, and in

(b) allowing inmates, who defendants knew or should have known were particularly susceptible to physical attack and sexual abuse by other prisoners, to be placed in the same cell in the administrative segregation building with two other prisoners and keeping them there while only one guard was on duty in that building, when based on prior experience they knew or in the exercise of ordinary care should have known: (1) that these practices made it highly foreseeable that some inmates, and in particular plaintiff Daniel R. Wade would be attacked or sexually abused and (2) that the number of guards provided was insufficient to prevent such attack and sexual abuses or to rescue inmates should such attacks occur.

19. In addition, defendants Edward E. Haynes, Walter David Blackwell and the Division of Corrections and their officers, agents, assistants and employees were grossly negligent in failing to assign an adequate number of guards to the administrative segregation building on

the dates in question when they individually and collectively knew, or the exercise of ordinary care should have known, based on prior experience: (a) that this practice made it highly foreseeable that some inmates, and in particular plaintiff Daniel R. Wade, would be attacked or sexually abused and (b) that the number of guards provided was insufficient to prevent such attacks and sexual abuses or to rescue inmates should such attacks occur.

20. The acts of Defendants and each of them, subjected plaintiff to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and have caused plaintiff to suffer damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

WHEREFORE, plaintiff respectfully prays this Court to:

a) permanently enjoin the defendants, their agents, assistants, successors, employees and persons acting in concert or cooperation with them from further violating the rights, privileges and immunities guaranteed to the plaintiff under the Constitution of the United States of America;

b) grant compensatory damages to plaintiff in the sum of Five Hundred Thousand Dollars ($500,000.00);

c) grant punitive damages to plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00);

d) grant plaintiff his costs of this action, including a reasonable attorney's fee.

COUNT TWO

Comes now the plaintiff and for Count Two of his SECOND AMENDED COMPLAINT hereby adopts by

reference paragraphs 1 through 17 of Count One of this SECOND AMENDED COMPLAINT and further states:

18. Defendants Edward E. Haynes, Walter David Blackwell, William H. Smith, William Schroeder, Fred Miles and the Division of Corrections and their officers, agents, assistants and employees, individually and collectively, egregiously failed to provide adequate security for plaintiff Daniel R. Wade by:

(a) placing him in the same cell in the administrative segregation building with two other inmates and by

(b) placing him in the same cell in the administrative segregation building with two other inmates and keeping him there while only one guard was on duty in that building when they knew, or in the exercise of ordinary care should have known, based on prior experience, that plaintiff Daniel R. Wade was highly susceptible to physical attack and sexual abuse by other inmates and that: (1) these actions made it highly foreseeable that he would be physically attacked and sexually abused, and (2) that the number of guards provided was insufficient to prevent such attacks and sexual abuses or to rescue the plaintiff should such attacks occur.

19. In addition, defendants Edward E. Haynes, Walter David Blackwell and the Division of Corrections and their officers, agents, assistants and employees egregiously failed to provide security for plaintiff Daniel R. Wade by failing to assign an adequate number of guards to the administrative segregation building on the dates in question when they individually and collectively knew, or the exercise of ordinary care should have known, based on prior experience: (a) that this practice made it highly foreseeable that some inmates, and in particular plaintiff Daniel R. Wade, would be attacked or sexually abused and (b) that the number of guards provided was insufficient

to prevent such attacks and sexual abuses or to rescue inmates should such attacks occur.

20. The acts of Defendants and each of them, subjected plaintiff to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and have caused plaintiff to suffer damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

WHEREFORE, plaintiff respectfully prays this Court to:

a) permanently enjoin the defendants, their officers, agents, assistants, successors, employees and persons acting in concert or cooperation with them from further violating the rights, privileges and immunities guaranteed to the plaintiff under the Constitution of the United States of America;

b) grant compensatory damages to plaintiff in the sum of Five Hundred Thousand Dollars ($500,000.00);

c) grant punitive damages to plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00);

d) grant plaintiff his costs of this action, including a reasonable attorney's fee.

BRADLEY H. LOCKENVITZ
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314/897-3683

Attorney for Plaintiff

CERTIFICATE

I hereby certify that a copy of the above and foregoing SECOND AMENDED COMPLAINT was mailed, postage prepaid, addressed to Robert Presson, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri on this 27th day of July, 1978.

BRADLEY H. LOCKENVITZ

INSTRUCTION NUMBER 5

Your verdict must be for plaintiff if you believe:

FIRST: Defendants knew or should have known that placing two or more inmates in the same cell in administrative segregation with only one guard on duty in that building made it highly foreseeable that some inmates, and in particular the plaintiff Daniel R. Wade, would be physically attacked and sexually abused, and

SECOND: Defendants' conduct was grossly negligent or an egregious failure to protect the plaintiff Daniel R. Wade, and

THIRD: Such acts of defendants were done under the color of law of the State of Missouri and

FOURTH: Such acts violated plaintiff's Constitutional right to be free from cruel and unusual punishment.

FIFTH: As a direct result of such conduct, the plaintiff suffered injury.

Gross negligence as used in this instruction means a callous indifference or thoughtless disregard for the consequences of one's acts or failure to act.

Egregious failure to protect means a flagrant or remarkably bad failure to protect.

INSTRUCTION NUMBER 7

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you may assess punitive or exemplary damages in addition to any award of actual damages.

If punitive or exemplary damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same or they may be different. The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.

Opposition

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No. 81-1196

In the Supreme Court of the United States

October Term, 1981

WILLIAM H. SMITH,
Petitioner,

vs.

DANIEL R. WADE,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATUTES INVOLVED

42 U.S.C. Section 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent, Daniel R. Wade, makes the following additions and corrections to Petitioner's Statement of Facts.

Respondent was an inmate at the Missouri Intermediate Reformatory known as Algoa, entering that institution when he was 17 years old. When he entered the prison he was approximately 5 feet 8 inches tall and weighed 130 pounds. During his term there respondent suffered from beatings at the hands of inmates in the general population. These beatings resulted in black eyes for the respondent, black eyes that were apparent to at least four prison officials or employees. During one term while respondent was living among the inmates in the general population, one eye was black for six months. He once had a cut over an eye which scarred him for several weeks. Respondent's day to day existence in the general population of the prison consisted of constant fighting with other inmates. He lost most of these fights which were provoked by others and he received little if any assistance from prison guards. Respondent checked himself into the Special Treatment Unit for protection from assaults from inmates in the general population. The Special Treatment Unit was secured from the general population and was used to protect inmates acceptable to physical abuse. Respondent was moved to dormitory six for punitive segregation and administrative segregation for rule violations. Dormitory six was a two story dormitory with 26 cells on each floor. The cells on the second floor were approximately 65 square feet in size. The only access to the cells on the second floor was through steel or iron doors, locked from the outside with several small holes at the top of the doors. It was impossible for guards to see an entire cell without opening the door.

Only one guard was assigned to dormitory six. In July, 1976 while petitioner William Henry Smith was on duty in dormitory six inmate Elijah Smith was beaten to death by his cellmate in a cell on the second floor. Guards on duty in dormitory six were responsible for knowing where their inmates had been housed prior to entering administrative segregation. One guard testified that experience and common sense dictated not to mix inmates who had been housed in a Special Treatment Unit with inmates who had come from the general population while they were in dormitory six. No firm rules were established for double celling inmates in dormitory six other than an unwritten rule followed by petitioner not to mix black inmates with white inmates.

On October 27, 1976 respondent was placed in a cell in dormitory six with an inmate who had come from the general population. Later that day petitioner William Henry Smith placed a third inmate who had come from the general population in that same cell. That inmate, inmate Thompson, was sent to dormitory six because of fighting and an urgent need to separate him from others for his own safety and the safety of others. Another inmate who, like respondent had come from the Special Treatment Unit, was alone in a cell in dormitory six at the time this third inmate was placed in the cell with respondent by the petitioner.

REASONS FOR DENYING PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

The Court of Appeals below did not err in affirming an award of punitive damages, because the evidence supports a finding of reckless or callous disregard of respondent's rights, and such a finding automatically triggers the

proper consideration of punitive damages for prisoner plaintiffs under 42 U.S.C. Section 1983. A finding of this nature meets the test announced by Mr. Justice Brennan's separate opinion in *Adickes v. Kress*, 398 U.S. 144 (1970),

> It is sufficient for the plaintiff to show either that the defendant acted "under color of a statute, ordinance, regulation, custom or usuage of any State or Territory" with actual knowledge that he was violating a right "secured by the Constitution and laws." *or* (emphasis supplied) that the defendant acted with reckless disregard of whether he was thus violating such a right," citing C. McCormick Handbook on the Law of Damages Section 79 (1935), *Id.*

While it is true that Mr. Justice Brennan also ruled,

"To recover punitive damages, I believe a plaintiff must show more than a bar violation of Section 1983.", *Id.*, it must be noted that the Court in *Adickes* was not ruling on a case involving the same stringent requirement for finding liability as we have in the instant case. To establish liability at all in this case, respondent had to show gross negligence or an egregious failure to protect. This could be shown by a deliberate deprivation, which could be shown by recklessness, *Little v. Walker*, 552 F.2d 193, 197 n. 8 (7th Cir. 1977), or recklessness in ignoring known threats, *Schaal v. Rowe*, 460 F. Supp. 155, 157 (E.D. Ill. 1978), or deliberate indifference to known threats, *Estelle v. Gamble*, 429 U.S. 97 (1976). By the very nature of this action, if a defendant is found to have egregiously failed to protect a prisoner to the extent that the qualified privilege of prison officials in Section 1983 actions is overcome, then it is *a fortiori* that punitive damages may follow, or as the Court of Appeals below phrased it, the question is whether punitive damages are a necessary concomitant of a finding

of liability. The Fifth Circuit has taken that position. "In order to find cruel and unusual punishment, the jury must have found egregious conduct capable of supporting an award of punitive damages, *Fielder v. Bosshard*, 590 F.2d 105, 111 (5th Cir. 1979).

The reckless disregard test of Mr. Justice Brennan was adopted by the Third Circuit in *Cochetti v. Desmond*, 572 F.2d 102, 106 (3rd Cir. 1978). That court held, "Usually assessed both as an example and as a warning against particularly *egregious* (emphasis added) conduct, such damages serve both punitive and deterent functions. Such awards may be particularly appropriate as a means of vindicating public interest in preventing violations of civil rights by state officials," *Id.* at 105. This deterent function serves a more important purpose than retribution, *City of Newport v. Fact Concerns*, 450 U.S. 960 (1981). Not making punitive damages a concomitant of a finding of liability in prison cases would effectively abrogate the policy behind punitive damages.

Petitioner suggests the respondent did not meet a standard of malice or actual intent noted in *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978). Yet in applying this test courts have not abrogated the policy behind punitive damages with a narrow definition of malice or actual intent, *Guzman v. Western State Bank*, 540 F.2d 948, 953 (8th Cir. 1976); *Konczak v. Tyrell*, 603 F.2d 13 (7th Cir. 1979), *cert. den.*, 444 U.S. 1016 (1980). The Fifth Circuit in *Fielder* dealt with this proposition.

> We can divine no real difference between acting with 'deliberate' or 'callous difference' and committing acts which are 'substantially certain' to harm a prisoner. If the plaintiff establishes the requisite 'indifference' and thus establishes liability, then he would also have

> established the official's 'malicious intent' as defined in [*Wood v. Strickland*, 420 U.S. 308 (1975)], thus negating with the same proof of existence of a qualified privilege, *Id.* at 110.

See also *Galloway v. General Motors Acceptance Corp.*, 106 F.2d 466 (4th Cir. 1939). This holding is particularly applicable in the instant case where the defendant not only subjected the plaintiff to a situation which was substantially certain to cause him harm, but only a few months before had committed similar acts which had resulted in the death of another inmate.

The note in *Carey* does not conflict with these holdings as petitioner suggests. *Carey*, merely takes note of the fact that the district court in that case found no malicious intent. There was no discussion of the callous indifference or reckless disregard standard in any sense nor was there any reversal of the stand taken in *Estelle v. Gamble*, 429 U.S. 97 (1976), where this court held that malicious intent may be shown where conduct is so egregious and reckless that the natural consequences of that conduct implies the requisite malicious intent to do wrong.

The Court of Appeals did not decide an important question of federal law which has not been, but should be decided by this Court, nor is its decision in conflict with any decision of this Court. The evidence supports the award of punitive damages under the standards established by this Court and the courts of appeals and the punitive damage instruction submitted by the district court, reprinted here as appendix A, was proper.

CONCLUSION

WHEREFORE, respondent requests this Court deny petitioner's request for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the question of the standard for imposition of punitive damages pursuant to 42 U.S.C. Section 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

INSTRUCTION NUMBER 7

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you find the issues in favor of the plaintiff and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safeties of others, they you may assess punitive or exemplary damages in addition to any award of actual damages.

If punitive or exemplary damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same or they may be different. The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.

Petitioner's Brief

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No. 81-1196

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. SMITH,
Petitioner,

v.

DANIEL R. WADE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Does an award of punitive damages in an action under 42 U.S.C. § 1983 require a showing of actual malice on the part of the defendant?

2. If a showing of actual malice on the part of the defendant is not required for an award of punitive damages, does it require a showing of some circumstances or conduct in excess of that needed to establish a defendant's liability for compensatory damages under 42 U.S.C. § 1983?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

There is no written opinion from the District Court. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 663 F.2d 778 and was reprinted in the petition for writ of certiorari, Appendix A.

JURISDICTION

A judgment was entered against the defendant-petitioner and in favor of plaintiff-respondent in the United States District Court for the Western District of Missouri in an action pursuant to 42 U.S.C. § 1983. This judgment was affirmed in an opinion by the United States Court of Appeals

for the Eighth Circuit filed on November 9, 1981. Petition for writ of certiorari was filed on December 23, 1981, and granted on April 19, 1982. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The plaintiff was assigned as an inmate to the Algoa Reformatory, an institution operated by the Missouri Division of Corrections, in 1976. The Algoa Reformatory is an institution for first offenders, generally between the ages of 17 and 25. The institution consists of housing dormitories which have separate rooms to which inmates have their own keys (Tr. 234). In October of 1976 the population of Algoa Reformatory was approximately 600 inmates. The original designed capacity for the Algoa Reformatory was 425 (Tr. 222). Dormitory no. 6 contains the punitive and administrative segregation units of that institution. In contrast to the other housing units in the institution, dormitory no. 6 did have cells for lock-up purposes. The punitive

segregation area was used for short term confinement and the administrative segregation unit was employed for longer term confinement. Dormitory no. 6 had two floors which had 26 cells each (Tr. 12).

The plaintiff voluntarily checked into the protective custody unit of the Algoa Reformatory in late spring or early summer of 1976 (Tr. 383). Because of disciplinary violations by the plaintiff which occurred in the protective custody unit itself, the prison disciplinary committee decided upon a short term inpunitive segregation and a reassignment of plaintiff to the administrative segregation unit (Tr. 259, 265-266, 387, 390). After serving his term in punitive segregation, the plaintiff was transferred to the administrative segregation area of dormitory no. 6 on the morning of October 27, 1976 (Tr. 392). At that time the plaintiff was placed in a cell with another inmate by the name of McCarthy (Tr. 392). The defendant was not on duty at that time. At approximately 10:00 p.m., while the defendant was on duty in the segregation building, an inmate by the name of Thompson was brought to dormitory no. 6 and placed in the same cell as the plaintiff and McCarthy (Tr. 395). Plaintiff testified that shortly after this McCarthy and Thompson began to harrass him and eventually sexually assaulted him (Tr. 406).

The population of both segregation units at that time combined was approximately 110 to 120 (Tr. 547). At that time, only one guard was assigned to cover both floors of dormitory no. 6 during the evening shift (Tr. 13).

Plaintiff's complaint pursuant to 42 U.S.C. § 1983 was filed on February 14, 1978. A second amended complaint was filed on August 10, 1978. The defendants included Edward Haynes, the then director of the Missouri Division of Corrections; David Blackwell, the then superintendent

of the Algoa Reformatory; and William Schroeder, Fred Miles and William Smith, the petitioner herein, who were employed as correctional officers at the Algoa Reformatory. The plaintiff's second amended complaint alleged that the defendants knew or should have known of the danger posed to the plaintiff by housing him in the administrative segregation unit in this manner and that, therefore, his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated. (Joint Appendix, p. 5.) The trial court instructed the jury both as to the standard for compensatory damages as well as that for punitive damages. (Joint Appendix, pp. 13, 14.) A verdict was returned in favor of plaintiff and against defendant Smith in the amount of $25,000 actual damages and $5,000 punitive damages. Both awards were affirmed by the United States Court of Appeals for the Eighth Circuit in an opinion filed on November 9, 1981. *Wade* v. *Haynes,* 663 F.2d 778 (8th Cir. 1981). (Petition for writ of certiorari, p. A-1.)

SUMMARY OF ARGUMENT

I.

The petitioner, a defendant in the original proceeding before the District Court, urges that this court adopt a requirement of actual malice on the part of a defendant in order to support an award of punitive damages under 42 U.S.C. § 1983. Defendant employs the term actual malice herein to refer to actual ill will, spite, or intent to injure.

This Court has given previous indications that actual malice in the foregoing sense is necessary in order to support an award of punitive damages under 42 U.S.C. § 1983. *Carey* v. *Piphus,* 435 U.S. 268 (1978); and *City of Newport* v. *Fact Concerts, Inc.,* ____ U.S. ____, 101 S.Ct. ____, 69 L.Ed.2d 616 (1981). The dissent below considered this position controlling, in particular this Court's opinion in *Carey.* The majority, however, concluded that malice sufficient to form a basis for an award of punitive damages might consist of a reckless and callous disregard of known dangers to a plaintiff.

Historically the primary reasons advanced to justify the doctrine of punitive damages have been punishment and deterrence. This Court has indicated, however, that punishment has never been a central purpose to 42 U.S.C. § 1983. In order to rationally advance either punishment or deterrence as a goal, it is necessary to delineate precise standards which provide adequate notice as to when a defendant may be subject to punitive damages. Just as in the criminal law, punishment by way of punitive damages without adequate notice as to what conduct justifies such a sanction, violates a very fundamental principle of our judicial system. Similarly, for deterrence to be effective, people must have notice of what conduct is proscribed or will subject them to sanction. Recklessness, callousness,

wantonness, or any of the other common standards which courts have devised with regard to punitive damages do not provide a sufficient degree of notice in order to make either punishment or deterrence a rational justification for punitive damages. Defendant believes that only a showing of actual malice provides the necessary specificity and narrows the jury's focus such that the unpredictability and possible bias which this Court has noted in connection with punitive damages can be avoided. Because there was no evidence of actual malice, the award of punitive damages should be reversed.

II.

Even if actual malice is not required in every instance in order to justify an award of punitive damages, defendant urges that it is required in this case. The Court of Appeals below upheld the award of punitive damages on essentially the same level of conduct as that which was held to establish the defendant's liability for compensatory damages. The dissent argued that the level of conduct necessary to overcome qualified immunity and that necessary to award punitive damages should be different.

Defendant contends that an award of punitive damages must be based on some aggravating circumstances over and above the factual elements necessary to award compensatory damages. However, because standards for basic liability vary, what are aggravating circumstances in one case may not be in another. Defendant believes that one cannot import a standard of punitive damages from one case to another when the standard for liability for compensatory damages varies radically between them.

The standard of liability for compensatory damages, whatever it might be in a particular case, is established for a particular reason, resulting from a balancing of the in-

terests involved. In this case, the standard of liability for compensatory damages has been set high in order to overcome the qualified immunity which this Court has held available under 42 U.S.C. § 1983. Defendant believes that the qualified immunity which this Court has recognized serves legitimate and significant interests, and that any attempt to impose both compensatory and punitive damages for the same level of conduct is both illogical and counter-productive to those interests.

Defendant contends, therefore, that punitive damages must be based upon aggravating circumstances in every case and that in this case, a showing of actual malice is the only rational aggravating circumstance which might conceivably justify an award of punitive damages. Because the Court of Appeals below did not apply such a standard, defendant urges that this Court reverse the award of punitive damages.

ARGUMENT

I.

An award of punitive damages under 42 U.S.C. § 1983 should require a showing of actual malice on the part of the defendant.

This Court has previously indicated that punitive damages are available in a "proper" case under 42 U.S.C. § 1983. *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *City of Newport* v. *Fact Concerts, Inc.*, ____ U.S. ____, 101 S.Ct. ____, 69 L.Ed.2d 616 (1981). The instant case presents the question of what constitutes such a "proper" case. In *Carey* v. *Piphus* this Court indicated that punitive damages would be appropriate if a defendant had acted with the malicious intention to deprive a plaintiff of his rights or to do him injury. *Carey* v. *Piphus, supra,* at 257, n. 11. In *Fact Concerts* this Court stated:

> "If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments." *City of Newport* v. *Fact Concerts, Inc., supra,* at 632.

The court of appeals below, however, held that the malice necessary to impose punitive damages can be found from a "reckless and callous disregard of known dangers." *Wade* v. *Haynes,* 663 F.2d 778, 786 (8th Cir. 1981). (Petition for Writ of Certiorari, p. A-14.) The dissent in the court below concluded that a finding of actual malice was a necessary prerequisite to the imposition of punitive damages. *Wade* v. *Haynes, supra,* at 787-788. (Petition for Writ of Certiorari, p. A-18.) As used herein the term actual malice will not refer to that term of art created by this Court in defamation cases but rather to the more traditional com-

mon law meaning of malice as employed by this Court in *Carey* v. *Piphus, supra;* ill will, spite, or intent to injure. Cf. *Cantrell* v. *Forrest City Publishing Company,* 419 U.S. 245 (1974), and *Beckley Newspaper Corp.* v. *Hanks,* 389 U.S. 81 (1967).

Defendant believes that a brief review of the justifications for the doctrine of punitive damages is necessary for the consideration of what circumstances are appropriate for their imposition. Historically, the rationale for punitive damages is somewhat unclear. Although the very use of the term "punitive" may imply a strictly penal rationale, other theories have been advanced. It has been suggested that one rationale for the rise of the doctrine of punitive damages was the nonrecoverability of certain items of damage or costs. Kenneth R. Redden, *Punitive Damages,* § 7.4 (B) and (C) (1980); James D. Ghiardi and John J. Kircher, *Punitive Damages, Law and Practice,* § 1.02 (1981). In fact, very clearly this Court recognized the practical, if not legal, connection between punitive damages and costs of litigation which were not generally recoverable. *Day* v. *Woodworth,* 54 U.S. 363 (1851). However, with the expansion of items of damage which are properly recoverable, as well as the increased availability of recovering costs and fees pursuant to 42 U.S.C. § 1988, this rationale, if it was ever a major consideration, is certainly decreased in importance. As this Court has noticed previously, the potential liability for attorney's fees under 42 U.S.C. § 1988 provides a substantial assurance that the constitutional rights of individuals will not be ignored. *Carey* v. *Piphus, supra,* at 257, n. 11. While in the past the foregoing rationale may have had some impact upon the formulation of the standard authorizing the imposition of punitive damages, defendant believes that the definition of an appropriate case for punitive damages under 42

U.S.C. § 1983 must be viewed in light of the most current rationale for the doctrine.

The two rationales for punitive damages which this Court has advanced have been punishment and deterrence. *Carey* v. *Piphus, supra.* However, this Court cautioned in *Fact Concerts* that punishment has never been as prominent a purpose under 42 U.S.C. § 1983 as have compensation and deterrence. *City of Newport* v. *Fact Concerts, Inc., supra,* at 632. In fact, it has been suggested that the existence of 18 U.S.C. § 242, as a criminal counterpart to 42 U.S.C. § 1983, also undercuts a punishment rationale under the latter. *Valcourt* v. *Hyland,* 503 F.Supp. 630 (D. Mass. 1980).

Deterrence on the other hand has been recognized as a primary purpose under 42 U.S.C. § 1983. *City of Newport* v. *Fact Concerts Inc., supra; Owens* v. *City of Independence,* 445 U.S. 622 (1980); *Robertson* v. *Wegmann,* 436 U.S. 584 (1978). However, deterrence is itself a penal concept, as is punishment. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). Since the major justifications for punitive damages are both traditionally penal in nature, defendant believes that punitive damages constitute a quasi-criminal fine. It is the quasi-criminal nature of the award which defendant believes necessitates a showing of actual malice as a necessary predicate to its imposition.

This Court has held on numerous occasions that, in the criminal context, due process requires that a criminal statute provide adequate notice that conduct is illegal and that men of ordinary intelligence should not be forced to guess at the meaning of criminal statutes. *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Smith* v. *Goguen,* 415 U.S. 566 (1974). The requirement of adequate notice in the criminal context has as its foundation the punishment and deterrence rationales of criminal law. In *United States* v. *Harriss,* 347 U.S. 612

(1954), the Court stated that the principle underlying the requirement of notice is that no person should be held criminally responsible if he could not reasonably understand what conduct was proscribed. To the extent that punishment remains a viable purpose for punitive damages under 42 U.S.C. § 1983, defendant submits that it would be equally illogical to punish by means of punitive damages if one does not have adequate notice of what level of conduct would subject him to such a sanction.

With regard to the rationale of deterrence, this Court has indicated that since it is assumed an individual can choose between courses of conduct, the law insists upon adequate notice as to what is or is not criminal so that one may act accordingly. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). If one does not have adequate notice of what is proscribed, then one could not be deterred, by the existence of a sanction, from pursuing such a course of conduct. Similarly, if one has inadequate notice as to what justifies the imposition of punitive damages, then one cannot be deterred from engaging in that conduct by the availability of such damages.

Defendant submits, therefore, that in order to properly and logically serve the interests of punishment or deterrence, the standard for imposition of punitive damages must be precisely delineated so as to provide notice. The United States Court of Appeals for the Eighth Circuit has indicated that punitive damages may be awarded based upon "oppression, malice, gross negligence, willful or wanton misconduct or a reckless disregard for the rights of the plaintiff." *Guzman* v. *Western State Bank*, 540 F.2d 948, 953 (8th Cir. 1976). While terms such as these may have some utility in characterizing conduct for the purpose of determining a level at which an award of compensatory damage is appropriate, defendant contends that they are

totally inadequate in the realm of punitive damages. The primary flaw of such terms is that they are inherently susceptible to varying interpretations and coupled with the virtually unlimited ability of a jury to impose punitive damages, they are inadequate. As this Court noted in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), a jury's discretion with regard to punitive damages is limited only by the "gentle rule that they not be excessive." Defendant contends that it is simply impossible to predict with any reasonable degree of certainty what constitutes recklessness, wantonness, oppression, or any of the other generalized terms which have generally been held to authorize the imposition of punitive damages. Given this basic inability, punishment is irrational and deterrence unlikely. Even with regard to future violations, if one cannot reasonably determine what fact or facts resulted in the jury's determination, it is unlikely that the goal of deterrence would be significantly served, if at all. The wider the range of factors which go into a jury's determination or the wider the range of discretion of a defendant, the more difficult it becomes to make any sort of reasoned judgment regarding a future course of conduct.

In *Milwaukee and St. Paul Railroad Company* v. *Arms*, 91 U.S. 489 (1875), this Court reversed an award of punitive damages imposed on the basis of gross negligence. This Court stated that gross negligence had never been adequately defined and that imperfect and unsuccessful attempts should be abandoned. Although this Court in that case indicated that punitive damages could be awarded for either willful conduct or conduct which exhibits a reckless indifference to the rights of others, defendant believes that this Court should now recognize that attempts over the past 100 years to adequately define such terms as recklessness have been imperfect and unsuccessful and should

likewise be abandoned. In fact, this Court has, on at least two occasions, noted the unpredictability of punitive damages. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979), and *Gertz* v. *Robert Welch, Inc., supra,* at 350. In *Foust* this Court indicated the manner in which punitive damages could be abused.

> "Moreover, it cannot be ignored that punitive damages may be employed to punish unpopular defendants. As we observed in the defamation context: '[Since] juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger . . .'" *International Brotherhood of Electrical Workers* v. *Foust, supra,* at 50, n. 14.

Defendant contends that a standard of actual malice in the sense of ill will or intent to injure, as opposed to constructive or implied malice, provides a greater degree of specificity and, therefore, better serves the goals of punishment and deterrence. This standard focuses a jury's attention on a specific factor rather than on a generalized characterization of conduct which can vary widely depending upon the individual members of the jury. In a criminal context a jury or court is rarely, if ever, given a carte blanche with regard to sentencing. In fact, the maximum fine under 18 U.S.C. § 242, the criminal counterpart to 42 U.S.C. § 1983, is $1,000, as opposed to the $5,000 punitive damages awarded in this case. Given a jury's virtually unlimited discretion with regard to the amount of punitive damages, defendant believes that it is all the more important that a jury's deliberation on this issue be ap-

propriately guided and limited by requiring that only a showing of actual malice will justify an award of punitive damages. As this Court noted in *Carey* v. *Piphus, supra,* at 256-257, compensatory damages alone have a deterrent effect and there is no evidence that Congress intended to establish a more formidable deterrent. Although this Court has since gone on in *Fact Concerts* to indicate that punitive damages are available under 42 U.S.C. § 1983, to the extent that a desire or need for increased deterrence is the rationale for that expansion, such damages should be available only under the most exacting standards. Defendant contends that a standard of actual malice is the only standard which provides the specificity necessary to enhance either the punishment or deterrence rationales and to justify an expansion beyond the deterrence already inherent in the award of compensatory damages. Defendant contends, therefore, that the Court of Appeals below erred in upholding the award of punitive damages against him which was admittedly not based upon a finding of actual malice.

II.

Even if a showing of actual malice is not required for an award of punitive damages in all instances, such a showing is required in this case because of the general principle that punitive damages requires the showing of some level of conduct in excess of that needed to establish a defendant's liability for compensatory damages.

Even if a standard of actual malice is not required in order to award punitive damages in every case under 42 U.S.C. § 1983, defendant submits that such a standard is required in this instance. The Court of Appeals below held that malice sufficient to justify an award of punitive damages may, in addition to traditional ill will, consist of a reckless and callous disregard for known dangers. This was

essentially the same standard upon which the jury predicated the award of compensatory damages. In the verdict director, liability was premised on gross negligence which was defined as a callous indifference and thoughtless disregard for the consequences of one's acts or failure to act (App. p. 13). As noted in Point I, this Court has indicated that punitive damages are available in a "proper" case under 42 U.S.C. § 1983. *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *City of Newport* v. *Fact Concerts, Inc.* ____ U.S. ____, 101 S.Ct. ____, 69 L.Ed.2d 616 (1981). However, defendant believes that the statement that some cases are "proper" for punitive damages carries with it the negative implication that some cases are improper vehicle for such relief, even though a plaintiff may be entitled to injunctive relief or compensatory damages. Defendant contends therefore, that the standard of liability for injunctive or compensatory relief cannot, consistent with this Court's statements in *Carey* and *Fact Concerts*, automatically trigger a jury's consideration of an award of punitive damages. There must be some aggravating circumstances over and above the facts necessary to establish the existence of the constitutional tort under 42 U.S.C. § 1983. The foregoing principle has been specifically adopted by the Third and Seventh Circuit Courts of Appeals in *Cochetti* v. *Desmond*, 572 F.2d 102 (3rd Cir. 1978), and *Konczak* v. *Tyrrell*, 603 F.2d 13 (7th Cir. 1979), *cert. denied* 444 U.S. 1016 (1980). In particular, the Third Circuit in *Cochetti* relied upon Justice Brennan's separate opinion in *Adickes* v. *Kress and Company*, 398 U.S. 144 (1970). Defendant recognizes that Justice Brennan suggested therein that reckless disregard of a plaintiff's rights would justify an award of punitive damages. *Id.* at 233. However, defendant believes that that dicta must be viewed in context of what has been held to be the appropriate standard of liability for compensatory damages. For instance, in *Konczak* the standard for basic

liability was intentional or reckless disregard of plaintiff's rights. With regard to punitive damages, the court focused on the existence of non-existence of malice.

The appropriate standard for an award of punitive damages cannot be viewed in isolation or in a vacuum. One cannot take what has been held to be an aggravating circumstance sufficient to justify punitive damages in one case and apply it to an entirely different case in which those same facts would simply establish the basic liability for compensatory damages. To do so would run afoul of the basic policy reasons why a particular standard of liability has been established at the level that it has. Standards of liability for compensatory damage, whether they be negligence, gross negligence, recklessness, or deliberate indifference, are not set arbitrarily. Standards of liability are established at various levels to reflect what the court or the legislature has perceived to be a balancing of appropriate societal interests. In other words, it is an insufficient argument to say in this case that the standard of basic liability is high and that therefore compensatory and punitive damages should be considered at the same level.

The level of basic liability for cases such as this has been established at a high level for a very good reason. As the dissent below pointed out, the jury's finding of basic liability in terms of callous indifference to the plaintiff's rights was necessary in order to overcome the qualified immunity possessed by a correctional official. *Wade* v. *Haynes,* 663 F.2d 778, 786 (8th Cir. 1981). (Petition for writ of certiorari, p. A-15.) This Court has recognized the existence and necessity for a qualified immunity in various contexts and for various levels of officials. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Procunier* v. *Navarette,* 434 U.S. 855 (1978). Defendant believes that one of the foremost reasons ad-

vanced by this Court for the recognition of a qualified immunity is that it protects an official's ability to exercise the discretion which has been afforded him without undue timidity. *Wood* v. *Strickland, supra,* at 321. In fact, a concern over the possible undue inhibiting effects of punitive damages was one factor which lead this Court to totally reject the availability of punitive damages under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq. International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42, 51 (1979).

Defendant believes that the necessity for the qualified immunity in this instance is sharply brought into focus when one realizes that the defendant was charged not only with the welfare and safety of the plaintiff, but also with the welfare and safety of the 110 to 120 other inmates who were confined in the segregation unit during the time that he was on duty (Tr. 547). From the record below it would appear that the jury rendered its verdict against the defendant on the basis that it was he who was responsible for placing Thompson as the third man in the cell with the plaintiff (Tr. 651-654). Of course, given the availability of only 52 cells in that unit, it is obvious that triple celling was occurring in other cells and the defendant might be open to a similar charge on behalf of other inmates no matter where he placed Thompson. Further, one must keep in mind that all of the inmates in that unit were in there for disciplinary reasons and all, including the plaintiff, could be viewed as posing a threat

It is obvious that a great many interests are at stake in the apparently simple task of assigning a newly arrived inmate to a unit. Consistent with this Court's prior opinions, defendant believes that the protection afforded by qualified immunity is an absolute necessity under these and a myriad of other situations which face a correctional

official. However, to award punitive damages on the same standard of conduct which is necessary to overcome that qualified immunity significantly underminds the protection afforded. As discussed in Point I, this Court has recognized that awards of punitive damage are frequently unpredictable and possibly infected with personal bias. Further, the control over the amount of a jury's award of punitive damages is minimal at best. In the defamation context, this Court held for very similar reasons that punitive damages unnecessarily exacerbate the danger of media self-censorship. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

While defendant does not equate the protection afforded by the First Amendment with that of qualified immunity under 42 U.S.C. § 1983, the protection afforded by the latter has been established for a significant reason. An award of punitive damages, which does not require some aggravating circumstances, unnecessarily exacerbates the danger of self-restriction in the exercise of discretion by state officials. The danger of this form of self-censorship is that correctional officials must often act for the safety and welfare of hundreds and thousands of inmates and not simply the plaintiff who is appearing before the court. The failure of such officials to act or their hesitancy in acting may often carry with it its own dangers.

To maintain the degree of protection which qualified immunity affords to the exercise of discretion, the defendant believes that a higher standard of liability must be established for punitive damages over that for compensatory damages. Since the level of conduct already required to overcome the qualified immunity in this case is callousness or a reckless indifference, defendant contends that the only rational standard to justify punitive damages would be that of actual malice. Because the Court of Appeals below failed to make this crucial distinction between compen-

satory and punitive damages, defendant believes that the award of the latter must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, insofar as it affirms the award of punitive damages against the defendant, should be reversed.

Respectfully submitted,

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No. 81-1196

In the Supreme Court of the United States

October Term, 1981

WILLIAM H. SMITH,
Petitioner,

VS.

DANIEL R. WADE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does an award of punitive damages in an action under 42 U.S.C. Section 1983 require more than a showing of callous or reckless disregard of Constitutional rights which result in physical injury?

2. If a showing of actual malice on the part of the defendant is not required for an award of punitive damages, does it require a showing of some circumstances or conduct in excess of that needed to establish a defendant's liability for compensatory damages under 42 U.S.C. Section 1983?

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No. 81-1196

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WILLIAM H. SMITH,
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DANIEL R. WADE,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondent, Daniel R. Wade, makes the following additions and corrections to Petitioner's Statement of Facts.

Respondent was an inmate at the Missouri Intermediate Reformatory known as Algoa, entering that institution when he was 17 years old (T. 367). When he entered the prison he was approximately 5 feet 8 inches tall and weighed 130 pounds (T. 370). During his term there re-

spondent suffered from beating at the hands of inmates in the general population. These beatings resulted in black eyes for the respondent, black eyes that were apparent to at least four prison officials or employees including the superintendent (T. 15, 16, 24, 25, 30, 252, 370-375). During one term while respondent was living among the inmates in the general population, one eye was black for six months. He once had a cut over an eye which scarred him for several weeks (T. 372). Respondent's day to day existence in the general population of the prison consisted of constant fighting with other inmates. He lost most of these fights which were provoked by others and he received little if any assistance from prison guards (T. 372-374). Respondent checked himself into the Special Treatment Unit for protection from assaults from inmates in the general population (T. 10, 11, 261, 262, 383, 387). The Special Treatment Unit was secured from the general population and was used to protect inmates susceptible to physical abuse (T. 10, 11, 261, 262, 383, 387). Respondent was moved to dormitory six for punitive segregation and administrative segregation for rule violations (T. 259, 265, 266, 387, 390). Dormitory six was a two story dormitory with 26 cells on each floor. The cells on the second floor were approximately 65 square feet in size. The only access to the cells on the second floor was through steel or iron doors, locked from the outside with several small holes at the top of the doors. It was impossible for guards to see an entire cell without opening the door (T. 331).

Only one guard was assigned to dormitory six. In July, 1976 while petitioner William Henry Smith was on duty in dormitory six inmate Elijah Smith was beaten to death by his cellmate in a cell on the second floor (T. 241-242, 306). Guards on duty in dormitory six were responsible for knowing where their inmates had been

housed prior to entering administrative segregation (T. 19, 20, 200, 203, 225, 318). One guard testified that experience and common sense dictated not to mix inmates who had been housed in a Special Treatment Unit with inmates who had come from the general population while they were in dormitory six (T. 200-201). No firm rules were established for double celling inmates in dormitory six other than an written rule followed by petitioner not to mix black inmates with white inmates (T. 313-317).

On October 27, 1976 respondent was placed in a cell in dormitory six with an inmate who had come from the general population (T. 38, 39, 392-393). Later that day petitioner William Henry Smith placed a third inmate who had come from the general population in that same cell (T. 395). That inmate, inmate Thompson, was sent to dormitory six because of fighting and an urgent need to separate him from others for his own safety and the safety of others (T. 321-322). Another inmate who, like respondent had come from the Special Treatment Unit, was alone in a cell in dormitory six at the time this third inmate was placed in the cell with respondent by the petitioner (T. 365).

SUMMARY OF ARGUMENT

I.

The respondent, the plaintiff in the District Court, urges this Court to affirm the opinion of the Court of Appeals because a reckless or callous disregard of safety resulting in physical injury warrants an award of punitive damages under 42 U.S.C. Section 1983.

These are the identical standards required to overcome the qualified immunity of prison officials in Section 1983 actions. A deliberate deprivation of Constitutional

rights and actual malice can be inferred from such conduct. There is no real difference between acting with deliberate or callous indifference and committing acts which are substantially certain to cause harm. Cases where this Court and others have required more than bare violation of Section 1983 to warrant punitive damages are not applicable on this point, because they were not dealing with the same stringent requirement for finding liability for actual damages as we have in this case.

Being subject to punitive damages does not give a defendant all the rights afforded defendants in the criminal law, because the primary purpose of punitive damages is deterrence. Even if punitive damages are regarded as a quasi-criminal fine, adequate notice of the proscribed conduct was given because the standard is not so vague that men of ordinary intelligence would have to guess at its meaning. To so hold would make all criminal statutes proscribing reckless behavior, including manslaughter, unconstitutional. Furthermore, a public official is deemed on notice of the proscribed conduct from pre-existing case law.

II.

The policy of detering violations of Constitutional rights requires that punitive damages be available for plaintiffs who meet the standards required for punitive damages under 42 U.S.C. Section 1983 even in cases where those standards are identical to those required for an award of actual damages. Punitive damages serve a public interest in detering future violations. Malice can be inferred from reckless or callous acts. Even where that inference is not made, there is no meaningful justification for making the standards higher in cases where a qualified

immunity exists except in areas involving free speech. No First Amendment rights are involved here, and no interest comparable to First Amendment rights is present. The qualified immunity will not be undermined by upholding the Court of Appeals, because the immunity still must be overcome to obtain actual damages.

ARGUMENT I

The decision below should be affirmed because, showing a reckless or callous disregard of individual rights which results in physical injury justifies an award of punitive damages under 42 U.S.C. Section 1983. This meets the test of Mr. Justice Brennan in his concurring opinion in *Adickes v. Kress*, 398 U.S. 144 (1970).

"It is sufficient for the plaintiff to show either that the defendant acted 'under color of a statute, ordinance, regulation, custom or usage of any State or Territory' with actual knowledge that he was violating a right 'secured by the Constitution and laws,' *or* (emphasis supplied) that the defendant acted with reckless disregard of whether he was thus violating such a right," citing C. McCormick Handbook on the Law of Damages, Section 79 (1935), *Id.*

To establish liability at all in the instant case, respondent had to show gross negligence or an egregious failure to protect the plaintiff from other prisoners. (Instruction Number 5, Joint Appendix) (The basic liability and resulting award of actual damages are not at issue before this Court.) Meeting these standards was necessary to overcome the qualified immunity of prison officials.

These standards also have been referred to as deliberate indifference to a known threat to health or safety, *Estelle v. Gamble*, 429 U.S. 97 (1976), recklessness in ig-

noring known threats, *Schaal v. Rowe*, 460 F.Supp. 155, 157 (S.D. Ill. 1978), callous indifference to predictable consequences, *Clappier v. Flynn*, 605 F.2d 519, 531 (10th Cir. 1979), *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979), *Roberts v. Williams*, 456 F.2d 819, 827 (5th Cir. 1971), flagrant culpability, *Van Horn v. Lukhard*, 392 F.Supp. 384, 387 (E.D. Va. 1975), *Redmond v. Baxley*, 475 F.Supp. 1111, 1117 (E.D. Mich. 1979), egregious failure to protect, *Penn v. Oliver*, 351 F.Supp. 1292 (E.D. Va. 1972), and gross negligence, *Leite v. City of Providence*, 463 F.Supp. 585, 590 (D.R.I. 1978). Deliberate deprivation of a Constitutional right can be shown by recklessness, *Little v. Walker*, 552 F.2d 193, 197 n.8 (7th Cir. 1977). Punitive damages are available in Section 1983 actions, *City of Newport v. Fact Concerts, Inc.*, 69 L.Ed.2d 616 (1981), particularly those involving aggravated circumstances, *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979) *cert. den.* 444 U.S. 1016 (1980), *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974), *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), and in cases where the defendant demonstrates malice, gross negligence, willful or wanton misconduct or a reckless disregard for the rights of the prisoner, *Wade, supra* at 785, citing *Guzman v. Western State Bank*, 540 F.2d 948 (8th Cir. 1976).

There is no distinction between the standards required to overcome the qualified immunity and those required for punitive damages. While petitioner suggests that some form of malice or actual intent is required as noted in *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978), malice can be implied from the acts of a defendant that demonstrates a reckless or egregious disregard for the safety of prisoners, *Estelle, supra* at 105-06, *Wade, supra* at 786, *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978).

To be callously indifferent to one's civil rights or to callously or recklessly disregard them is tantamount to

being egregious as that term was used in *Cochetti v. Desmond*, 572 F.2d 102 (3rd Cir. 1978), and *Penn v. Oliver*, *supra*, both cases involving liability for injuries to prisoner plaintiffs. It is also tantamount to being grossly negligent as that term is used in similar cases, *Van Horn v. Lukhard*, *supra*, *Redmond v. Baxley*, *supra*. It is important to note that one of the grounds for denying punitive damages in *Cochetti* was because the plaintiff had not pleaded anything akin to reckless disregard, callous indifference, egregious failure or gross negligence, *Id.* at 106. That is not the case here.

Petitioner cites *Newport*, *supra*, for the proposition that the only time punitive damages are appropriate under Section 1983 is when the defendant acts knowingly or maliciously to deprive others of their civil rights, but that opinion did not limit such awards to those circumstances alone.

By the very nature of this action, if a defendant is found to have egregiously, recklessly or callously failed to protect a prisoner, it is *a fortiori* that punitive damages may result. As the court below phrased it, the question is whether punitive damages are a necessary concomitant of a finding of liability in cases of this nature, *Wade*, *supra* at 785. *Fielder* has so held. "We can divine no real difference between acting with 'deliberate' or 'callous indifference' and committing acts which are 'substantially certain' to harm a prisoner. If the plaintiff establishes the requisite 'indifference' and thus establishes liability, then he would also have established the official's 'malicious intent' as defined in [*Wood v. Strickland*, 420 U.S. 308 (1975)], thus negating with the same proof the existence of the qualified immunity," *Fielder*, *supra* at 110.

It is true that in *Adickes*, Mr. Justice Brennan also ruled that "To recover punitive damages, I believe a

plaintiff must show more than a bare violation of Section 1983, *Id.* at 233, cited as guidance in *Cochetti v. Desmond*, 572 F.2d 102, 106 (3rd Cir. 1978), but it must be noted that neither *Adickes* nor *Cochetti* involved the same stringent standard for finding liability for actual damages as we have in the instant case.

The fact that punitive damages serve to punish and deter does not mean the petitioner was entitled to all the protections afforded defendants in the criminal law, and even if punitive damages are what he terms a quasi-criminal fine, he was given adequate notice of the proscribed conduct. The notion that petitioner is entitled to the protections given criminal defendants flies in the face of *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

> It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindicative damages upon a defendant, having in view of the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty given to the party injured. In many civil actions, such as libel, slander, seduction etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpi-

tude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindicative rather than compensatory. *Id.* at 371.

As petitioner recognizes, the primary emphasis of punitive damages is on deterrence, not punishment, *Newport, supra, Owen v. City of Independence,* 445 U.S. 622 (1980). Assuming that the policy of deterrence is quasi-criminal, petitioner was given adequate notice of the proscribed conduct by the previously existing case law dealing with the rights of prisoners. "An official is liable under Section 1983 'if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights' of the person affected," *Bogard v. Cook,* 586 F.2d 399 (5th Cir. 1978), citing *Wood v. Strickland,* 420 U.S. 308, 322 (1975). Those charged with the responsibility of operating our prisons cannot be allowed to be totally oblivious to Sixth Amendment Rights. Furthermore, the standard of recklessness is not so vague that men of ordinary intelligence would have to guess at its meaning.

If petitioner is correct in asserting that a standard of carelessness is too vague to justify punishment, then all criminal statutes proscribing reckless conduct, including most manslaughter statutes, are suspect.

Finally, the mere existence of a criminal statute on the subject has never obviated the need or right to punitive damages in this Court, and for good reason. If petitioner's argument on this point becomes the law of the land, every victim of crime will be deprived of an opportunity to punitive damages in civil litigation.

ARGUMENT II

The policy behind punitive damages requires that they be available in those cases where the test of liability for awarding actual damages is the same as that for awarding punitive damages. The rationale behind punitive damages in Section 1983 cases is to punish or deter violations of Constitutional rights, *Carey, supra, Newport, supra, Owen v. City of Independence*, 445 U.S. 622 (1980). The emphasis is on deterrence, *Newport, supra, Owen, supra,*

> "Usually assessed both as an example and as a warning against particularly egregious conduct, such damages serve both punitive and deterrent functions. Such awards may be particularly appropriate as a means of vindicating the public interest in preventing violations of civil rights by state officials. The availability of punitive damages as a deterrent may be more significant than ever today, in view of the apparent trend of decisions curtailing the powers of federal courts to impose equitable remedies to terminate such violations, *Cochetti, supra* at 105-106.

The fact that a qualified immunity exists does not make the conduct involved any less heinous or any less repugnant to the public interest. As was shown in Argument I, actual malice can be implied by reckless conduct. Even if that implication is not made, recklessness or callousness is all that is required (see Argument I), and there is no justifiable reason to increase the burden simply because a qualified immunity exists in the test for actual damages. To do so could effectively eliminate the possibility of punitive damages in cases involving questions of cruel and inhuman punishment.

Eliminating the possibility of punitive damages in cases such as this where the plaintiff must overcome a

qualified immunity would be stating to public officials that they are safe in violating the Constitutional rights of others as long as they make sure actual damages are at minimum. It would be putting a price tag on the ability to seek redress for such violations in cases involving qualified immunity. It would make any concept of deterrence meaningless except in those cases where actual damages are high. It would deprive one class of civil rights litigants, those who must overcome qualified immunity to make their case for actual damages, of the rights given to those who do not have to overcome such a burden without any reasonable justification.

If a state initiated such a policy, the courts at a minimum would consider whether that policy bore some reasonable relationship to a legitimate state purpose to determine if the state was violating the equal protection clause contained in the Fourteenth Amendment. Although the Fourteenth Amendment does not directly apply to the federal government or the courts, due process would require those institutions to consider equal protection when establishing new policy. If the equal protection test would be applied to the petitioner's argument on this point, one would be hard pressed to find any legitimate purpose furthered by such a distinction in treatment between two classes of plaintiffs, and no compelling interest would be served.

The availability of attorney fee awards is insufficient to insure that those with low actual damages would seek redress for Constitutional violations. As a practical matter anyone who is a party in a lawsuit is subject to a much higher price tag, both financially and emotionally than that supplied by attorney fees and court costs. If Section 1983 is to continue to serve as a meaningful vehicle to seek redress for violation of Constitutional rights and to deter

government officials from violating those rights, punitive damages must be made available to all those who suffer because of reckless, callous or egregious conduct regardless of whether or not those standards are also the standards for acquiring actual damages.

Petitioner argues that the facts of the case demonstrate the need for the qualified immunity of prison officials and that the qualified immunity would somehow deteriorate if punitive damage were awarded in this case without a showing of actual malice. The facts also show: that the petitioner in this case violated what another guard called a rule of common sense, to wit: that inmates from a protective custody unit should not be housed with inmates from the general population of the prison when they are in administrative segregation (T. 200-201); that petitioner knew one of respondent's assailants was sent to administrative segregation because of fighting and an urgent need to separate him from others for the safety of others (T. 321-322); that petitioner placed this assailant in a cell with respondent and one other inmate from the general population even though another cell in the dormitory contained only one inmate who, like respondent, had come from the protective custody unit (T. 365); that respondent, immediately prior to coming to administrative segregation, was placed in the protective custody unit to be protected from the general population because he was susceptible to physical abuse (T. 10, 11, 261, 262, 383, 387). All of this, along with petitioner's knowledge that inmate Elijah Smith was beaten to death in similar circumstances during petitioner's shift only a few weeks before this incident (T. 241-242, 306), is basis for a jury to find a need to deter further conduct of this nature regardless of the existence of the qualified immunity. Awarding punitive damages under such circumstances certainly does not

undermine the protection given by the qualified immunity as the petitioner suggests, because the immunity still must be overcome in order to obtain actual damages and to get the case to a jury.

Finally, petitioner, in citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), attempts to analyze the Court's concern with the effect of punitive damages on First Amendment freedoms with the case at bar. The comparison is not warranted. At no time has this Court ever suggested that the qualified immunity granted prison officials is on the same plane as the concern for inhibiting free expression. The concerns which justified the establishment of a qualified immunity for certain state officials, see *Procunier v. Naverette*, 434 U.S. 855 (1978), *Wood, supra*, have no relation to free speech or the paramount public interest in protecting free speech.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Docket Sheet

NO. 81-1196-CFX	TITLE William H. SMITH, Petitioner v. Daniel R. Wade

DOCKETED	COURT
Dec. 23, 1981	United States Court of Appeals for the Eighth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Paul Robert Otto
	Counsel for Respondent: Bradley H. Lockenvitz
Dec. 23, 1981	Petition for writ of certiorari filed. (Record filed).
Feb. 3, 1982	DISTRIBUTED. 2-19. (Stricken).
Feb. 16, 1982	Response requested.
Mar. 18, 1982	Brief for the respondent in opposition filed.
Mar. 24, 1982	DISTRIBUTED. 4-16.
Apr. 19, 1982	Petition GRANTED.

May 12, 1982	Joint appendix filed.
June 4, 1982	Brief for the Petitioner filed.
July 2, 1982	Brief for the Respondent filed.
Aug. 25, 1982	CIRCULATED.
Nov. 10, 1982	ARGUED.